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REPORTS OF CASES  
IN THE  
SUPREME COURT OF APPEALS  
OF  
VIRGINIA.

MARTIN PARKS BURKS, REPORTER.

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VOL. CVII.

FROM JUNE 1, 1907, TO MARCH 1, 1908.

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**JUDGES**  
**OF THE**  
**Supreme Court of Appeals**  
**DURING THE TIME OF THESE REPORTS.**

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**JAMES KEITH, PRESIDENT.**  
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**JOHN ALEXANDER BUCHANAN,**  
**GEORGE MOFFETT HARRISON.**  
**STAFFORD GORMAN WHITTLE.**

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**ATTORNEY-GENERAL:**  
**WILLIAM ALEXANDER ANDERSON.**

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**STATE REPORTER:**  
**MARTIN PARKS BURKS.**

# RULES OF COURT.

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## XVII. *Rehearing.*

No application for a rehearing will be entertained unless made within ten days after the decision is announced (except as otherwise authorized by law), and no rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with it and desires a rehearing. And an application under the Code, chapter 170, section 3492, to rehear and review any case decided by this court within the last fifteen days of the preceding term, shall be made before the end of the said term or within the first fifteen days of the next succeeding term, and not thereafter. And no application for a rehearing will be entertained by the court, in any case, unless the reasons therefor, printed, shall be filed at the time such application is made.



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CASES DECIDED

IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

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Wytheville.

PITTARD'S ADMINISTRATOR V. SOUTHERN RAILWAY CO.

June 13, 1907.

1. **RAILROADS—Yards—Sounding Signals—Case at Bar.**—A railroad yard is a place of ceaseless activity, where cars are being shifted and engines moved, and those engaged therein are exposed to more than ordinary danger, and should be alert to guard against such dangers. The sounding of whistles and the ringing of bells at such places is not essential for the protection of employees, but would tend to increase the confusion. In the case at bar, an employee was killed in a railroad yard, but the evidence fails to establish negligence on the part of the company.
- 2 **MASTER AND SERVANT—Negligence of Servant.**—A master is under no greater obligation to care for the safety of his servant than the servant is to care for himself, and if the servant's negligence is the proximate cause of his injury, he cannot recover of the master.

Error to a judgment of the Corporation Court of the city of Danville in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

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*Peatross & Harris, B. H. Custer, and B. S. Royster, for the plaintiff in error.*

*Harrison & Leigh, for the defendant in error.*

KEITH, P., delivered the opinion of the Court.

This suit was instituted by the administrator of F. L. Pittard to recover damages for his death, alleged to have been due to the negligent act of the Southern Railway Company. The defendant demurred to the evidence introduced before the jury, a verdict fixing the damages at \$6,500 was found, the Court entered judgment for the defendant, and the case is before us upon a writ of error.

The evidence tends to prove the following facts: That the deceased was at the time of his death in the employment of the Atlantic & Danville Division of the Southern Railway as a brakeman; that he was engaged in the yards of the railway company in the city of Danville; and that upon the night of the accident two engines, known as a double-header, were taken from the round-house in a northerly direction upon a side-track and then driven, tender in front, along this track about 150 feet to the trestle over Fall Creek. On this trestle there were three tracks—the eastern side-track upon which the double-header was moving, the main line, and to the west of the main line another side-track. The double-header having moved far enough upon the side-track upon which it had entered to clear the main line and leave it free for traffic, the brakeman, who was standing in the space of about five or six feet which intervened between the easternmost of the tracks upon the trestle and the main line, gave the signal to the engineer to slow down, which was done, and the double-header came to a stop. In from three to five minutes after he was last seen by the engineer between the tracks his dead body was found lying upon the main line. He had been struck by an engine moving backward

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along the main track in a northerly direction and drawing a caboose car. No one saw the accident, and therefore resort must be had to circumstantial evidence in order to ascertain the manner of his death.

One of the crew of the engine which inflicted the injury says that immediately before the accident he saw the deceased standing on the main line at a distance of three or four car lengths; and that he was giving the stop signal. Witness said that he "thought that he got on the engine; but I never did know what became of him; that the train upon which witness was engaged was moving at a rate of from 20 to 25 miles an hour; that it was running backward; and that there were no lights upon the tender, no bell ringing and no whistle being sounded. Witness also stated that a man could have been seen at a point a car-length's distance from the tender by the engineman sitting in his cab.

It appears that train No. 11 was 15 or 20 minutes behind time, and, at the moment of the accident, was expected in about five minutes, and was entitled to the right of way on the main track. At the time the engine which caused the accident passed, the double-header, to the crew of which the deceased belonged, had come to a standstill. The duty of the deceased with respect to it had for the time ended, and there was nothing for him to do at the moment but care for his own safety.

The yard of a railroad company is the scene of ceaseless activity, the shifting of cars and the movement of engines; and in order to carry on their work and promptly discharge their duties there must be a careful economy of time, and as far as possible every moment must be utilized. Under such conditions, those engaged within yard limits are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injury from the movement of engines and cars always to be expected. The sounding of whistles and ringing of bells, under such conditions, would not add to the safety of

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employees, but serve only to confound them by adding to the confusion.

It is therefore said in section 1258 of Elliott on Railroads, that as to employees, the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yard, for the purpose of notifying such employees, who are familiar with the operation of the yard." *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758.

Under such conditions, the deceased having given the signal to the double-header to slow down, and having discharged his duty, should have provided for his own safety. According to the testimony of other witnesses, he had ample time after giving the signal to have placed himself in a position of safety. The proof is that he would have been uninjured had he stood between the tracks. He could have gotten upon his own engine. He could have done everything but what he did and have avoided the accident. Even the witness who stood upon the caboose which was being drawn backward by the engine which inflicted the injury, and who saw him giving the stop signal, says: "I thought he got on the engine, but I never did know what became of him," which shows that in the opinion of the witness there was time for him to have gotten upon the engine.

As was said by this court in *Darracott v. C. & O. Ry. Co.*, 83 Va. 288, 294-5, 2 S. E. 514, 5 Am. St. Rep. 266: "There are certain correlative duties on the part of the employee to the company; one of those is to use ordinary care to avoid injuries to himself; for the company is under no greater obligation to care for his safety than he is himself, and he must inform himself, so far as he reasonably can, respecting the dangers as well as the duties incident to the service. And in general, any negligence of an employee amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company."

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As we have said, no one witnessed the accident. No one saw the man when he was struck. Just how it happened is in some degree a matter of conjecture; and the circumstances, so far as they are disclosed, indicate that the proximate cause of the injury to the deceased was his want of reasonable care for his own safety rather than the negligence of the defendant in error.

The judgment of the corporation court is affirmed.

*Affirmed.*

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Statement.

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**Wytheville.**

E. A. WATKINS & BROTHERS v. JONES AND OTHERS.

June 13, 1907.

1. **EQUITY—Judicial Sale—Upset Bid—Confirmation.**—A judicial sale will not be set aside merely because an upset bid of a larger sum is offered. If the terms of the decree of sale have been complied with, and the land has been sold under favorable circumstances and has brought a fair price, and confirmation is recommended by the commissioners who made it, the sale should be confirmed. This is especially true where the party objecting to the confirmation and tendering the upset bid, was present at the sale and had ample opportunity to bid. Stability and confidence in judicial sales will, in this way, be best promoted, and the best price for property offered at such sales will be thus obtained.

Appeal from a decree in chancery of the Circuit Court of Southampton county, in the case of *Boykin v. Jones*, in which the court refused to confirm a sale made under its decree, at which sale appellants were reported as the purchasers.

*Reversed.*

The opinion states the case.

*Thomas W. Shelton*, for the appellants.

*J. U. Burgess, E. Frank Story and Leake & Carter*, for the appellees.

KEITH, P., delivered the opinion of the Court.

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In the chancery cause of *Boykin v. Jones and others*, there was a decree for the sale of certain real estate. Two commissioners were appointed, one of them counsel for the plaintiff and the other for the defendants, and at the sale George Jones, a son of the defendant John S. Jones, became the purchaser at the price of \$2175. By a decree of the 7th of September, 1905, this sale was confirmed, but, the purchaser failing to comply with the terms of sale, a resale was ordered. The property was again offered and Watkins and Brothers bid the sum of \$2100, and, that being the highest bid, the sale was reported by the commissioners, and its confirmation recommended. Before it was confirmed, however, John S. Jones put in an upset bid of \$300, paying in cash the sum of \$250.

It appears that John S. Jones was a one-half owner of the property sold; that he was a defendant in the cause; that his counsel was one of the special commissioners; that he was present at both the first and the second sales; that he was thoroughly acquainted with the property; that the property was assessed at \$400; that it brought \$2175 at its first offering and \$2100 at its second offering; that in the opinion of the commissioners who recommended its confirmation the price was a fair one; that the terms of sale were in all respects complied with; and the sole question before us is whether, upon these facts, the court should have refused to confirm the bid of E. A. Watkins and Brothers.

Under the practice of the English courts of chancery, where an upset bid is put in before confirmation, it is the rule to re-expose the property to sale; but such is not the law with us. We need not review the many decisions of this court touching this subject. That was done by Judge Riely in *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882. After reviewing all the Virginia authorities pertinent to the subject, the opinion states the law as follows:

“Considering the circumstances of the case at bar, and applying the rule prevailing in this State, our conclusion is that



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the Circuit Court did not err in rejecting the upset bids and confirming the report of sale of the parcels of land in question.

"The sale took place under favorable circumstances, was fairly made, and there is not a suggestion of misconduct or impropriety on the part of any one.

"There is no evidence or complaint even that the land did not sell for a fair price, and bring its market value. The commissioners state in their report that it brought a good price, and recommend the confirmation of the sale.

"The main upset bid was put in by one who had an agent at the sale, who bid for him. It has been generally understood by the profession, and enforced by the courts, that one who was a bidder at the sale, by himself or by an agent, which is the same thing, or was present and had the opportunity to bid, would not, as a general rule, be permitted to put in an upset bid. He must bid at the sale in open competition with all others what he is willing to give for the property. A different rule would have a pernicious effect upon judicial sales of property. \* \* \*

"Judicial sales are constantly taking place, and it must continue to be so as long as there are debts to be collected, and liens to be enforced. Great care should be observed that the practice of the court in acting upon a report of sale should not be such as to deter or discourage bidders, but such as to induce possible purchasers to attend such sales, to encourage fair, open, and competitive bidding in order that the highest possible price be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to the purchaser, but also to creditors, debtors, and the owners of property which has to be sold by the court."

The case before us is even stronger than that of *Moore v. Triplett* in some of its aspects, for here the party who put in the upset bid was present in person at the sale and not merely by an agent.

Of course the object of a sale is to secure the best price for

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the property, and this result can be best accomplished, not by accepting every upset bid offered under circumstances such as are disclosed by this record, but by the establishment of and adherence to rules which will inspire confidence in the stability of judicial sales, as was said by Mr. Minor in 2 Min. Inst. (4th ed.) 380, rather than by the introduction of a practice that will induce bidders to feel that judicial sales are not to be seriously taken. *Roudabush v. Miller*, 32 Gratt. 454.

For these reasons we are of opinion that the decree should be reversed, that the appellants should recover their costs, and that the cause be remanded for further proceedings not in conflict with the views expressed herein.

*Reversed.*

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Statement.

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**Wytheville.**

BROWDER v. SOUTHERN RAILWAY CO.

June 13, 1907.

1. EVIDENCE—*Abandoned Pleadings—Impeachment.*—Where an amended declaration has been substituted for the original, the averments of the original, in the absence of any evidence that they were unauthorized, may be introduced on the cross-examination of the plaintiff for the purpose of impeaching him.
2. EVIDENCE—*Improper Admission—When Harmless.*—A judgment will not be set aside for the improper admission of evidence by the trial court, which could not have prejudiced the objecting party.
3. MASTER AND SERVANT—*Safe Appliances—Inspectors—Defects to be Looked for.*—The duty of the master to use ordinary care to provide reasonably safe, sound and suitable machinery and appliances for the use of his servants, applies as well to car inspectors and repairers as to other servants, where the machinery or appliance provided is other than the thing to be inspected or repaired. In the latter case, there can be no recovery for injuries sustained because of defects in such machinery or appliances if the servant neglects his duty of inspection, and the defect is such as is discoverable by proper inspection.
4. APPEAL AND ERROR—*Rulings on Instructions—Correct Verdict.*—It is unnecessary to consider the rulings of the trial court in giving and refusing instructions, when, under proper instructions as applied to the facts of the case, a different verdict could not have been rightly found by the jury.

Error to a judgment of the Circuit Court of Brunswick county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

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Opinion.

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*Buford, Palmer & Eggleston*, for the plaintiff in error.

*William Leigh Williams*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the Court.

This is an action for personal injuries suffered by the plaintiff in error whilst in the service of the Southern Railway Company, the defendant in error.

The plaintiff was working for the railway company at Lawrenceville, one of the stations on its line of road at which its trains are inspected. One of the plaintiff's duties was, according to his own testimony, to look after all cars and engines which came into that station during the night to see if he could discover any defects, and if any were found to repair such of them as he could, and where he could not repair the defect to mark the car for the "shop" and report the fact to the foreman so that it could be sent in for repairs. Although the plaintiff denies that he was the night inspector of trains at that station, his own testimony as to what his duties were, as well as that of the defendant, shows clearly that, while he performed some other services, his chief duty was that of inspecting trains coming into that station at night.

While in the discharge of those duties (between five and six o'clock on the morning of July 4, 1904, upon a freight train which had come into the station during the preceding night), the plaintiff received the injuries complained of. He testified that he looked around the train—went down one side and came back on the other—to find defects, and made such repairs as he could; that when he got back to the last car in the train (next to the caboose) he went on top of the train to look over the cars, and found that the car next to the one from which he fell needed some repairs on the roof; that he started back to get his tools, which he had left on the ground near the caboose when he went on top of the train; that when he got on the

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car from which he fell he saw that it had been worked on, that nails had been freshly driven in the running board; that he went to the grab-iron, upon which he was to come down and noticed a new lag-screw there, and that everything looked secure; that when he took hold of the grab-iron and started down, the lag screw which held one end of the grab-iron and which was too short, pulled out and he was thrown back against a car on the next track, when he fell a distance of some ten feet and received the injuries for which he seeks to recover damages.

There are two assignments of error as to the action of the court in admitting certain evidence, which we will dispose of before considering the case on its merits.

The plaintiff in his examination-in-chief had testified that he did not consider himself an inspector of cars. Upon cross-examination the defendant asked him the following question: "On referring to the first declaration you filed in this cause, Mr. Browder, I find these words: 'It was the duty of the said plaintiff whenever required to do so by the said defendant, to inspect the cars of the defendant to ascertain whether any of them needed or required repairs.' When you employed your present counsel did you tell them anything about the case?" To which the witness answered, "Oh, yes, I told them about the case." The action of the court in permitting this evidence to go to the jury is assigned as error.

The objection made to its introduction was that the statements in the original declaration were those of counsel, not of the witness; that the amended declaration, upon which the case was being tried, set forth the plaintiff's case and was written in his presence after his counsel and himself had gone over the case; that the plaintiff had never read the original declaration, which had been withdrawn when the amended declaration was filed.

While there seems to be much conflict in the authorities upon the subject of the admissibility in evidence of abandoned or superseded pleadings as extra-judicial admissions, it seems to

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be settled, even in those jurisdictions where the averments in the original pleading are not permissible to disprove the allegations of the amended pleading, that the averments in the original may be introduced in cross-examination to impeach the plaintiff—at least in the absence of evidence that the pleading was unauthorized. See 1 Elliott on Ev., sec. 236; 16 Cyc. 971-973; 2 Wigmore on Ev., sec. 1067.

The pleading in question was filed by the plaintiff's authority and upon information to some extent furnished by him. It was therefore admissible upon cross-examination for the purpose for which it was introduced.

One of the defendant's witnesses had testified that the car from which the plaintiff fell was turned out of the shops of the Alabama Car Works, May 12, 1887, and that he had, as an employee of the defendant, kept a record of those cars. He was then asked the following question: "Taking that lot of 300 cars that were built about the same time by the Alabama people for the East Tennessee" (from which the defendant purchased them), "what do your records show as to the durability, or goodness or badness of those cars?"; which he answered as follows: "I find that of the 300 cars built over 17 years ago, 240 are still in service; that is, 60 have been destroyed or in accident."

If it be conceded that such evidence "was not legal and competent" to show that the Alabama Car Works were competent manufacturers, its admission could not have prejudiced the plaintiff and furnishes no ground for reversing the judgment.

The plaintiff insists that it was the duty of the defendant to see that the grab-iron on the car from which he fell was in a reasonably safe condition for use in climbing on and off the car, which was necessary in the performance of his duties in connection with the train. The defendant, on the other hand, contends that it was the plaintiff's duty to inspect the grab-iron and see that it was in a reasonably safe condition before using it.

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The general rule is that it is the duty of the master to use ordinary care to provide reasonably safe, sound and suitable machinery and appliances for the use of his employees in the performance of their duties; and this rule is as applicable to car inspectors and repairers as to other employees, where the machinery or appliance provided is other than the thing to be inspected and repaired. But is it the rule where the employee, by the terms of his employment, is charged with the duty of inspecting and repairing the machinery and appliances which he is using or working upon?

The inspection of the grab-irons on the cars was as much a part of the plaintiff's duty as was the inspection of any other part of the train. The safety of the employees on the train was dependent upon their being in good condition. They were parts of the safety appliances of the train, and only a few days before the plaintiff's injury his attention had been specially called by his superiors to the fact that under the regulations of the Interstate Commerce Commission and the rules and orders of the defendant company it was the duty of car inspectors to see that safety appliances of all cars were carefully inspected.

In one of the more recent works discussing this question it is said, that "where by the terms of the employment the servant is charged with the duty of inspecting the machinery and appliances which he is using, or with the duty of both inspecting and repairing them, he cannot recover for injuries sustained because of defects in such machinery or appliances if he neglects his duty in that regard, and if the defects are such as are discoverable by proper inspection." 20 Am. & Eng. Enc. L. (2nd ed.) 142.

This statement of the law seems to be fully sustained by the cases.

In the case of *R. & D. R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274, it was held that a conductor who by the rules of the company was required to inspect all cars picked up in transit could not recover for injuries received by him by reason of his failure to inspect such cars.

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In the case of *Bowers v. Bristol &c. Co.*, 100 Va. 533, 42 S. E. 296, it was held that defective insulation of wires, which it was the duty of a line inspector of an electric company to inspect, was a risk incident to the employment, and could not be made the ground of an action for damages by him against the company.

In the case of *A. & D. Ry. Co. v. West*, 100 Va. 13, 42 S. E. 914, it was decided that while it is the duty of a railroad company to use ordinary care to provide a reasonably safe place for its employees in which to perform their duties, it cannot be said that there was a lack of such ordinary care in a case where a depot agent, whose duty it was to keep himself advised and to report to the company as to the condition of the depot platform and grounds of the company, was injured by a defect in the platform which had been in daily use by himself and the public for several years, when there was nothing in its appearance to excite a suspicion of danger and the defect was so obscure that it would not have been disclosed on the most careful inspection.

It is insisted by the plaintiff that, even if it were his duty to inspect the grab-iron before using it, he made all the inspection that was necessary under the facts of the case. The evidence shows that the usual method of inspecting grab-irons is to strike them with a hammer or pull on them with the hands to see if they are securely fastened. He applied neither of these tests, nor did he apply any other test, but relied solely upon the fact that the car seemed to have been worked upon recently, that there was a new lag bolt in one end of the grab-iron, and that it seemed to be all right. These were circumstances which might be taken into consideration in inspecting the car and its safety appliances, but they did not do away with the necessity of applying a test to see that they were safe.

Under the plaintiff's own evidence he was not entitled to recover. It, therefore, becomes unnecessary to consider the assignments of error to the action of the court in giving and



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refusing instructions, for if it were conceded that the action of the court in giving or in refusing instructions was erroneous it would be harmless error, since under the facts of the case, upon correct instructions, a different verdict could not have been rightly found by the jury. *Wright v. Independence Bank*, 96 Va. 728, 732, 32 S. E. 459, 70 Am. St. Rep. 889, and cases cited.

We are of opinion that the judgment complained of should be affirmed.

*Affirmed.*

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Syllabus.

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**Wytheville.****STEVENS v. DUCKETT.**

June 13, 1907.

Absent, Cardwell, J.

1. **EQUITY—Issue out of Chancery—Object—When to be Ordered.**—The object of an issue out of chancery is to satisfy the conscience of the chancellor in a doubtful case. It is not sufficient that the evidence is simply conflicting, but the case must be doubtful, and there must be proper evidence that it is doubtful. The propriety of ordering an issue depends upon sound discretion, which is to be cautiously and diligently exercised according to the circumstances of the particular case. A party cannot be deprived, by an order for an issue, of his right to a decision by the court on the case as made by the pleadings and proof, unless the conflict of the evidence is so great, and its weight so nearly evenly balanced, that the court is unable to determine on which side the preponderance is.
2. **EQUITY—Issue out of Chancery—Affidavits Allowed by Statute—Contents.**—Under section 3381, Code 1904, the mere affidavits of parties and counsel that the case will be rendered doubtful by conflicting evidence, is not sufficient to warrant a chancellor in ordering an issue. The court is still to exercise its discretion, on sound principles of reason and justice, as to the necessity for the issue, and this it cannot do unless the affidavits contain sufficient facts to furnish a proper basis for its judgment. The affidavits simply take the place of the testimony required prior to the enactment of the statute.
3. **EQUITY—Issue out of Chancery—Effect of Improperly Ordering—Reversal—How Record Viewed on Appeal.**—In determining whether a trial court erred in awarding an issue out of chancery, this court will not be influenced by any matters connected with the testimony taken on the trial of the issue, but will look simply at the state of the proof existing at the time when the issue was ordered. If it appears that the issue was improperly awarded because of the in-

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sufficiency of the affidavits upon which the application was based, this court will reverse the order awarding the issue, although a verdict has been found in favor of the plaintiff, and will remand the cause for further proceedings.

Appeal from a decree of the Circuit Court of Fauquier county. Decree for the complainant. Defendant appeals.

*Reversed.*

The opinion states the case.

*George D. Beattys, George B. B. Lamb and George Latham Fletcher, for the appellant.*

*Barbour & Rixey, C. M. White and Keith & Keith, for the appellee.*

HARRISON, J., delivered the opinion of the Court.

This appeal is from several decrees of the Circuit Court of Fauquier county in a chancery cause, wherein the appellee, R. H. Duckett was complainant and the appellant, C. Amory Stevens, was defendant.

The bill alleges that in July, 1899, a partnership was agreed upon between the appellant and the appellee, which was consummated in December, 1899, for the purchase of the Kelly gold mine in Fauquier county, and such other real estate as might be thought desirable, and for the purchase of personalty useful in mining operations. The terms of the partnership are alleged to have been that appellant was to furnish all necessary funds to purchase the property mentioned, to develop and run the mine, and to provide appellee with funds to run his house, and clothe his family; that appellee, on his part, was to stay on the premises, do the mining, oversee all the work at the mine, conduct all negotiations for other property to be held by them, and to furnish the partnership his experience in

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mining, building mills and installing machinery, and to run the business; that all the property purchased was to be partnership property, appellant to have a three-fourths interest therein, and appellee a one-fourth interest; that a large amount of property was bought under this partnership agreement, and conveyed from motives of policy to the appellant; that the partnership agreement remained in force until January, 1904, when appellant claimed the exclusive ownership of all the property, and notified appellee that he must give up his house and leave the premises. The prayer of the bill is that the property in question may be declared to be partnership property, that a division of the personal property and a partition of the real estate may be had between the parties according to their respective rights.

The appellant filed an answer to the bill, in which he denies the formation, consummation or existence, at any time, of the alleged partnership; sets forth that appellee had been an employee of the appellant, upon the terms that if the mining operations proved successful appellee was to receive, as compensation for his services, three-sixteenths of any profits realized; details the expenditure by appellant of more than \$100,000, the heavy losses incurred in consequence of the ignorant and unfaithful conduct of appellee, and the final resolve of appellant to cease operations in order to save himself from continued imposition and eventual disaster.

There was a demurrer to the bill, which was properly overruled.

It appears from a *nunc pro tunc* order entered in the cause at the February term, 1907, and brought to this court by writ of *certiorari*, that at the May term, 1905, the circuit court, over the protest of the appellant, awarded an issue out of chancery, in advance of the introduction of any evidence, to be tried by a jury, to ascertain whether a partnership existed between appellant and appellee, and, if so, the terms thereof, and what property it embraced. This *nunc pro tunc* order shows

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that the basis for awarding the issue out of chancery was an affidavit filed by the appellee, in which it is stated that the issue to be determined would be rendered doubtful by conflicting evidence of the opposing party, and that he believed an issue out of chancery should be directed in the cause; and also a joint affidavit by counsel for the appellee, saying that they had read the affidavit of their client, that they were fully acquainted with the points in issue, and knew that the evidence would be conflicting, and that in their opinion it would be proper to award an issue out of chancery. The first and most important question to be considered on this appeal involves the court's action in directing this issue to be tried by a jury.

It has long been settled by the decisions of this court that an issue out of chancery will not be directed when the claim is altogether unsupported by evidence. The rule has been that the defendant cannot be deprived, by an order for an issue, of his right to a decision by the court on the case as made by the pleadings and the proof, unless the conflict of the evidence is so great and its weight so nearly evenly balanced that the court is unable to determine on which side the preponderance is. *Pryor v. Adams*, 1 Call 381, 1 Am. Dec. 533; *Wise v. Lamb*, 9 Gratt. 294; *Smith v. Betty*, 11 Gratt. 752; *Beverly v. Walden*, 20 Gratt. 147; *Mahnke v. Neal*, 23 W. Va. 57.

It is also settled by numerous decisions of this and other courts that the ordering of issues depends on the application of sound legal discretion to the circumstances of the case. It is not a power to be exercised at pleasure, and depending on arbitrary discretion. Ordering an issue must always depend upon sound discretion, to be cautiously and diligently exercised, according to the circumstances of each particular case. *Beverly v. Walden*, 10 Gratt. *supra*; *Mahnke v. Neal*, *supra*.

The object of an issue out of chancery is to satisfy the conscience of the chancellor in a doubtful case. *Almond v. Wilson*, 75 Va. 613. But the authorities all show that there must be proper evidence that the case is doubtful. In this connection it

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becomes necessary to consider the statute recently enacted by the General Assembly and now carried into section 3381, Va. Code, 1904, which is as follows: "Any court in which a chancery case is pending may direct an issue to be tried in such court or in any Circuit or Corporation Court, and the court shall have the discretion to direct such an issue to be tried before any proof has been taken by either plaintiff or defendant, if it shall be shown by affidavit or affidavits, after reasonable notice, that the case will be rendered doubtful by the conflicting evidence of the opposing party."

It will be observed that this act, in conformity with the rule theretofore existing, reposes in the court the exercise of its discretion in determining whether or not an issue shall be directed. The modification of the former rule governing in such cases is found in the provision that before any proof has been taken the court may act upon affidavit or affidavits. In other words, the affidavit takes the place of the testimony required prior thereto. The court cannot properly exercise sound discretion or tell whether "the case will be rendered doubtful by the conflicting evidence of the opposing party" unless the affidavits provided for shall contain facts sufficient to furnish a proper basis for the court's judgment.

In the case before us, the affidavits of the appellee and his counsel are mere opinions that in their judgment the evidence of the opposing party would be conflicting, and an issue out of chancery proper. If the statute were held to have intended that the affidavits filed should contain only the language of the statute without any facts, then in every chancery case the direction of an issue would become a matter of right and not of discretion, as a party to the suit can always state that in his opinion "the case will be rendered doubtful by the conflicting evidence of the opposing party." The Legislature, by the express language of the statute, reposed in the court the exercise of discretion in determining when there should be an issue out of chancery, and it could hardly have intended, in

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the same breath, to require the court to surrender its judgment and discretion and transfer the decision of that question to a party to the litigation, or his counsel.

We are of opinion that it was not intended by the statute to change the firmly established rule of law, that the chancellor was to properly exercise his discretion "on sound principles of reason and justice;" but that the change was merely to allow, instead of testimony of witnesses as to the facts, as theretofore, simply an affidavit as to the facts, or affidavits, as it might be that all the necessary facts would not always be in the possession of a single witness. A chancellor cannot properly exercise reason and discretion unless the facts upon which he is to act are before him in some form. Any other interpretation of the statute would, as already said, make the whole matter of directing an issue one of right and not of discretion on the part of the chancellor.

The issue is not to be directed simply because the evidence is contradictory. Chancellors are constantly called upon to decide cases upon testimony which is conflicting and contradictory.

In *Hord's Admr. v. Colbert*, 28 Gratt. 49, 60, Judge Staples says: "It does not follow that an issue is necessary and proper in every case where the evidence happens to be conflicting. If this was the rule, the chief time of the chancery courts would be occupied with trials before juries, or in considering their verdicts. The Circuit Courts and the judges of this court are constantly called upon to decide questions of fact upon testimony of a very conflicting character."

In *Keagy v. Trout*, 85 Va. 390, 395, 7 S. E. 329, Judge Lewis, speaking for the court, says: "The chancellor is not bound to direct an issue merely because the evidence is contradictory. He must exercise in the matter a sound discretion, and, if his conscience is satisfied, the expense and delay which a jury trial involves ought not to be incurred, except in particular cases in which by statute or practice, it is made a matter of right."

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It is suggested at bar that the Circuit Court having in this case directed the issue, and the jury having found the verdict, this court should not now disturb the result, even though of opinion that the issue was improperly awarded at the time it was ordered.

This court has repeatedly decided that the awarding of an issue out of chancery rests in sound discretion, subject to review on appeal.

In *Beverly v. Walden*, *supra*, it is said: "While it is true that directing an issue to be tried by a jury is a matter of discretion in a court of equity, it is equally true that such discretion must be exercised upon sound principles of reason and justice. A mistake in its exercise is a just ground of appeal; and the appellate court must judge whether such discretion has been soundly exercised in a given case."

In deciding the question, this court should not be influenced by any matters connected with the testimony taken on the trial, but should look simply at the state of the proof existing when the issue was ordered. The mere fact that there was an issue directed and tried, and a verdict rendered for the plaintiff, affords no reason why the court should not reverse the decree if the order directing the issue was improperly granted. *Collins v. Jones*, 6 Leigh 530, 20 Am. Dec. 216; *Smith's Adm'r. v. Betty*, *supra*; *Mahnke v. Neale*, *supra*.

In the case of *Smith's Adm'r. v. Betty*, *supra*, the court said: "In the case of *Prior v. Adams*, 1 Oall 382, 1 Am. Dec. 533, this court held that it was its duty, in reviewing a decree founded on the verdict of a jury, rendered on an issue out of chancery, to look to the state of the proofs existing at the time when the issue was ordered; and if satisfied that the chancellor had improperly exercised his discretion in directing the issue, to render a decree, notwithstanding the verdict, according to the merits, as disclosed by the proofs on the hearing when the issue was ordered."

We are of opinion that the Circuit Court, in directing the



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issue in this case, acted upon wholly insufficient affidavits, and failed to exercise the discretion contemplated by law in such matters. Upon well established rules of law, the decrees complained of must be set aside, and the cause remanded for further proceedings not in conflict with the views herein expressed.

*Reversed.*

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Statement.

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**Wytheville.****GARRETT v. FINCH AND OTHERS.**

June 13, 1907.

Absent, Keith, P.

- 1 **EQUITY—Multifariousness—Fraud.**—In cases involving questions of fraud, great latitude is allowed in pleading, both as to the circumstances charged and the parties impleaded, provided one connected scheme of fraud is averred. If justice can be conveniently administered in the mode adopted, the objection of multifariousness will not lie, unless it is so injurious to one party as to render it inequitable to accomplish the general good at his expense.
- 2 **RESCISSIION—Equity Jurisdiction—Remedy at Law.**—Where a contract of lease has been procured by fraud, the party defrauded has the right, upon discovery of the fraud, to elect to rescind, and to invoke the aid of a court of equity for that purpose.
- 3 **FRAUD—Representations of Fact or Opinion.**—Whether a misrepresentation is one of fact or opinion is not always easily determined. The relative knowledge of the parties dealing, their intentions, and all of the surrounding circumstances affect the interpretation, and hence, are to be considered. In the case in judgment, the representations alleged in the bill were sufficient to entitle the complainant to a hearing, and the demurrer should have been overruled.
- 4 **EQUITY—Laches—Reasonable Time—Demurrer.**—In a suit to rescind a contract for fraud, no precise time can be stated within which suit must be brought. What is a reasonable time must, in large measure, depend upon the exercise of a sound discretion by the court under all the circumstances of the particular case. In the case in judgment, in view of the allegations of the bill, the question of laches cannot be determined on demurrer, but must await the coming in of the evidence adduced upon the hearing.

Appeal from a decree of the Circuit Court of the city of Newport News. Decree for defendants. Complainant appeals.

*Reversed.*

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Opinion.

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The opinion states the case.

*Ashby & Read*, for the appellant.

*William C. Stuart* and *S. O. Bland*, for the appellees.

HARRISON, J., delivered the opinion of the Court.

On the 15th day of November, 1899, the appellant, A. C. Garrett, entered into a contract of lease with the appellees, F. F. Finch and M. A. Finch, his wife, whereby the appellant became the lessee of a certain lot 25 x 100 feet, situated on Washington Avenue, between 31st and 32nd Streets, in the City of Newport News. The contract, which is made part of the bill, shows that the lease was for a term of forty years from its date, at an annual rental of \$480 for the first five years, and \$600 annually for the residue of the term, payable in semi-annual instalments on the first days of January and July in each year. The lessee further covenants to erect a building on the leased lot not less than three stories in height, and costing not less than \$2500. The contract contains other covenants and conditions not necessary to be stated.

In September, 1906, the appellant filed the bill in this cause, alleging that he had been induced to enter into this contract by the false representations, warranties and statements of the lessors and their agent, one W. I. Fitzsimmons; that he would not have made the contract but for his faith in the truth of these representations, and praying that, because of the wrong done him by reason of such false representations, the contract be rescinded and general relief granted.

The bill was dismissed upon demurrer, and from that action of the court this appeal was taken.

The grounds of demurrer, in the order in which we will consider them are, (1) that the bill is multifarious; (2) that the plaintiff's remedy, if any, was at law; (3) that the allegations

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of the bill, if true, set up mere expressions of opinion, and not representations of fact; and (4) that the plaintiff was guilty of laches in disaffirming the contract.

The court is of opinion that the bill is not multifarious. It presents in the ordinary way the grounds of the plaintiff's prayer for a rescision of the contract, and it is not perceived that the course pursued could result in injury to any one of the parties to the litigation. *School Board v. Farish*, 92 Va. 156, 23 S. E. 221; *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330; *Snyder v. Grandstaff*, 98 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

In *Jordan v. Liggan*, *supra*, it is said that, in cases involving the question of fraud, a very great latitude is allowed in pleading, both as to the circumstances charged and the parties impleaded, provided one connected scheme of fraud be averred. If justice can be conveniently administered by the mode of proceeding adopted, the objection of multifariousness will not lie, unless it is so injurious to one party as to render it inequitable to accomplish the general good at his expense.

The court is further of opinion that the plaintiff had the right to seek relief in equity. The prime object of this suit was to have rescinded a contract alleged to have been procured by fraud. The plaintiff had a right to elect to rescind, upon discovery of the fraud, and to invoke the aid of a court of equity for that purpose. *Powell v. Berry*, 91 Va. 568, 22 S. E. 365; *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 537; Pom. Eq. Jur., sec. 684, etc.

The court is further of opinion that the allegations of the bill are not confined to mere expressions of opinion, but that representations of fact are sufficiently alleged to entitle the plaintiff to relief if such representations are shown to have been made. The bill alleges that prior to making the lease contract, and as an inducement to the plaintiff to enter into it, he was assured that a certain pier, then in progress of construction, would be completed and maintained, its construction being pro-

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vided for; that arrangements had been consummated with the steamboat lines which run from Petersburg, Richmond, Washington and Baltimore, whereby such steamers would stop and have their wharfage regularly at this pier; that arrangements had been made for foreign steamers also to stop regularly at this pier; that arrangements had been made, whereby 32nd street was to be opened and graded to the approach of said pier, and a number of warehouses erected on or adjacent to the pier; that because of these arrangements, which had been consummated, this pier would become the leading pier in the city, and 32nd street extended to the pier, the main thoroughfare of the city. It is further alleged that the lot leased by the plaintiff is about three hundred yards from the river, and is so situated as to be peculiarly benefited by the completion and maintenance of the pier in question, and the extension of 32nd street through the other lands of the lessors to the pier. It is further alleged that it was well known to the lessors that unless these representations and assurances were fulfilled the lot in question was not worth anything like the rental the plaintiff finally agreed to pay therefor; and that the plaintiff would certainly not have made the lease if such assurances and representations had not been given.

It is not always an easy matter to determine whether a given statement is one of fact or opinion. The relative knowledge of the parties dealing, their intentions and all of the surrounding circumstances, which can only be gathered from the evidence, affect the interpretation which the courts put upon representations in determining whether they be of fact or opinion. Taking the allegations of the bill to be true, in the light of the adjudications of this court, the alleged representations were sufficient to entitle the plaintiff to a hearing. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *Watkins v. West Wytheville &c. Co.*, 92 Va. 1, 22 S. E. 554; *Orr & Litton v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Owen v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

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The court is further of opinion that, under the allegations of the bill, the objection of laches, on the part of the plaintiff, in disaffirming the contract of lease is not well taken. The bill alleges that the appellees, F. F. Finch and his wife, M. A. Finch, were, at the date of the lease, the owners of a very large and valuable estate in the city of Newport News, including a large tract of land in the heart of the city fronting on the James River, upon which the pier in question was being built, and through which 32nd street, when extended, had to run. It is further alleged that in 1901 the pier was nearing completion, when M. A. Finch brought a suit against her husband for a divorce and a settlement of his accounts in the management of her property; that this suit is still pending, involving an immense estate worth over half a million dollars; that it has been a protracted and bitterly contested litigation; that M. A. Finch, after abandoning her prayer for divorce in Virginia, established her residence in one of the Dakotas for the purpose of obtaining a divorce, and has for some years past been a non-resident of this state. It is further alleged that this litigation involved, in part, the land upon which the pier was being built and through which 32nd street extended would run to reach the pier; that upon the institution of this litigation all work and improvement on the property of the lessors practically stopped, and no effort was made to carry out the representations which had been made to the plaintiff as an inducement to making the lease contract; that in this unsettled condition of affairs with respect to the Finch estate, plaintiff was led to believe, and did believe, that the representations which had been made to him could not be fulfilled and carried out until the controversy between the lessors was ended, and it was ascertained who was to own the pier and the property adjacent thereto. It is further alleged that during this time complainant rested upon the belief that the statements and representations which he had relied on would be carried out, and he relieved of the necessity of invoking the aid of a court

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of equity to rescind a contract, which though fully performed by him, including the erection of a three-story building on the leased lot at a cost of \$6,500, had been broken in every material respect by the lessors; but from the fact that the incompleting pier had recently been allowed to decay, and other things which had come to the knowledge of complainant, his faith in the honesty of the lessors had been shaken, and he forced to believe that the statements and representations which he had relied on were, in fact, false and untrue, and made to deceive and defraud him; and that complainant was therefore forced into this litigation in order to avoid the imputation of laches in the premises. It is further alleged that this suit is in no way an effort on the part of complainant to escape the consequences of a bad bargain; that real estate values in Newport News, and especially in the locality where the lot in question is situated, are practically the same now that they were when the lease was made; that had the statements and representations been true and carried out, the lot would have been worth the rental which complainant had agreed to give for it, but that such bargain, without the representations being fulfilled, was unconscionable.

In a suit for the rescission of a contract upon the ground of fraud in its procurement, no precise or defined limit of time can be stated within which the interposition of the court must be sought. What is a reasonable time cannot be well defined so as to establish any general rule, and must in a great measure depend upon the exercise of the sound discretion of the court, under all the circumstances of the particular case. *Kerr on Fraud & Mistake*, p. 305, *et seq.*

In view of the allegations of the bill, to which we have adverted, it cannot be stated as a matter of law, that the appellant has, by laches, lost his right to disaffirm the contract in question. Whether or not such right has been lost is a question of fact which must be determined in the light of the evidence adduced upon the hearing.

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For these reasons the decree appealed from must be reversed, the demurrer to the bill overruled, and the cause remanded for further proceedings.

*Reversed.*



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Statement.

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**Wytheville.****COOK v. SEABOARD AIR LINE RAILWAY.**

June 13, 1907.

1. **WATERS AND WATER COURSES—*Change of Course.***—The owner of land may change the whole course of a stream within the limits of his own land, provided he restores the water, undiminished, to the original channel before leaving his own premises, and other persons are not injured by such diversion.
2. **WATERS AND WATER COURSES—*Overflow—Change of Course.***—The right of a land owner, under circumstances like those in this cause, to change the course of the superabundant water produced by freshets, is not less clear than his right to change, on his own land, the course of the ordinary stream.
3. **RAILROADS—*Flood Waters—Culverts—Case at Bar.***—Where the proprietor of land changed the course of a stream through his own land and then returned it to its original channel, before leaving his land, and constructed a wasteway, to carry off the surplus water, in case of freshets, both of which appeared to be permanent, and some years thereafter a railroad company constructed its road-bed across said channel and wasteway, it was the duty of the company to provide for the escape of the water through the wasteway as well as through the channel, although the proprietor may have originally intended to change the location, at some future time, of said artificial channel. The company should have adapted itself to existing conditions, which could not thereafter have been changed to its prejudice. Flood water, which overflows from a natural stream, is not surface water, and a railroad company is liable in damages for injuries resulting from its failure to construct proper culverts to carry it off where its embankments would otherwise obstruct its passage.

Error to a judgment of the Circuit Court of Chesterfield county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

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*Lunsford L. Lewis* and *J. M. Gregory*, for the plaintiff in error.

*E. Randolph Williams* and *E. H. Wells*, for the defendant in error.

HARRISON, J., delivered the opinion of the Court.

This action was brought by Lydia W. Cook against the Seaboard Air Line Railway for the recovery of damages alleged to have been sustained by her, by reason of the skillful and negligent construction of its railroad bed on its right of way through her premises.

The plaintiff is the owner of a farm in Chesterfield county, containing about three hundred acres, upon which she has for some years operated a valuable and profitable granite quarry. There flows through this tract of land a small stream of water, which, in its original course, flowed through a portion of the quarry, so that in opening the quarry it became necessary to divert the stream from its natural channel. This was accomplished by constructing a canal which carried the water around the east side of the quarry, and restored it, below the quarry, to the natural bed of the stream before it had left the premises of the plaintiff. There was also constructed by the plaintiff a waste way, connected with the canal some distance below its head, for the purpose of carrying off the superabundant water whenever there was a freshet.

At the time the defendant railway company acquired its right of way and constructed its road-bed, this canal and waste way had been continuously in use for a number of years, and both, as well as the purpose for which each was designed, were as apparent as the existence of the quarry itself. The right of way condemned by the defendant crossed the wasteway and ran from that point for a distance of one hundred and fifty yards parallel with and near to the canal, the canal being be-

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tween the railroad and the quarry. No culvert was constructed or other provision made for the passage of the water across the right of way of the defendant company, which had theretofore been carried off through the wasteway provided by the plaintiff for that purpose, but earth, stone and gravel were deposited by the defendant on the west side of its right of way and near to the east bank of the canal, so that the superabundant water, in times of freshets, was thrown upon the plaintiff's premises and her quarry flooded.

Under the instructions given by the Circuit Court there was a verdict for the defendant which the court refused to disturb, on a motion by the plaintiff for a new trial, and the judgment complained of was rendered.

The crucial question in the case involves the action of the court in giving its fourth instruction, which is as follows: "If the jury believe from the evidence that Mrs. Cook, prior to the building of the railroad, changed the course of the stream originally and naturally passing over the site of her quarry in such a manner as to alter the face of nature and fix for all time, as far as she was concerned, the said stream in a new and permanent channel, then this new bed or channel became to all legal intents a natural water course which the railroad company was bound to provide for and has no right to obstruct; and if they believe further that the said company—the proprietor of the opposite bank of said stream—did alter the course of and obstruct the same by raising the level of or erecting a dike upon said bank, so that in time of flood the water was impelled upon the opposite shore, whereby Mrs. Cook's quarry was submerged and her property injured, then they must find for the plaintiff, Mrs. Cook, in such sum as will compensate her for the injury thus inflicted. But on the contrary, if the jury believe from the evidence that the canal and wasteway constructed by Mrs. Cook through her lands was not a permanent change in the bed of the natural stream fixed for all time as far as she was concerned, and that the purpose and intent was to remove the

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same from place to place, or time to time, as the convenience or necessities of the quarry might demand, then said canal and wasteway was not a natural stream for which the railroad company was bound to provide a passage. In that case the law imposed no obligation on said company to preserve or continue said wasteway, and it was lawful for it to raise or erect a dike upon the bank of said canal, or otherwise obstruct the same, as the convenience or safety of its business required."

That the stream in question is a natural stream is not disputed; and that the plaintiff had the legal right to divert the water and turn it into an artificial channel, as she did, is not and cannot be denied; it being a settled principle of the common law that a proprietor may change the whole course of a stream within the limits of his own land, provided he restores the water undiminished to the original channel before leaving his premises, and other persons are not injured by such diversion. Kent's Com., Vol. 3, p. 439; Farnham on Waters, Vol. 2, p. 1645; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Canfield v. Andrews*, 54 Vt. 1, 41 Am. Rep. 828.

The right of the land owner, under circumstances like those of the case at bar, to change the course of the superabundant water produced by freshets is not less clear than her right to change on her own land the course of the ordinary stream. *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247. This is an important and instructive case, and the principles there settled are in many material particulars applicable to and sustain the view taken in the case at bar.

As stated in the brief of counsel for the defendant railway, instruction No. 4 tells the jury "that the obligations of the railway company with respect to the overflow or to the flood-water in the plaintiff's canal were to be determined by them upon their conclusion as to whether the diversion of the natural stream through the plaintiff's property was a temporary or a permanent diversion." In other words, that the obligation of

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the defendant company to provide a passage across its right of way for the water that had theretofore flowed through the plaintiff's wasteway, and the right of the plaintiff to recover the damage resulting to her from its failure to provide such passage, are made to depend upon the purpose of the plaintiff to continue the artificial channel exactly as it then was "fixed for all time, so far as she was concerned."

The principle announced by this instruction is not applicable to the case at bar. That principle is applicable when the question to be determined is whether or not a right has been abandoned. If, for example, the defendant company had built its road across the empty bed of the original stream when no provision for carrying off water was necessary, and the plaintiff had afterwards turned the water back into the original channel, her right to do so would depend upon whether or not she had diverted the water into the artificial channel with the intention of permanently abandoning the old channel.

The case of *Miss. Cent. R. Co. v. Mason*, 51 Miss. 234, is a well considered case illustrative of this principle. There it was held that to relieve a railroad company from the duty of maintaining a passage across its right of way for a water-course, on the ground that the adjoining owner had changed the course into a new channel, the intention to make a permanent change must be evidenced by an unequivocal and decisive act evincing a purpose to abandon the old channel. In that case the road was built across the old channel.

The case at bar is very different from that to which the principle announced by instruction No. 4 is applicable. There was evidence tending to show that some years before, when the canal and wasteway were constructed, the plaintiff contemplated, in the event the future development of the quarry and the needs of the business should require it, to move the canal further back on a line about where the defendant's road has since been built; when, however, the road was built, any intention to change the location of the canal had, from necessity, to

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be abandoned, as the canal lay between the railroad and the quarry, and within a few feet of both—indeed, for some distance the defendant's right of way adjoins the canal, thus creating an impassable barrier to any further movement of the canal in that direction. But, if this were not so, the plaintiff, having, as we have seen, the right to divert the stream, on her own land, from its original course to the new channel, would have had an equal right to change the artificial channel, as the needs of her business required, provided the change was made without injury to others. Yet the theory of the instruction is that the plaintiff could not recover unless the canal and wasteway constructed by her was in fact a permanent location, "fixed for all time as far as she was concerned."

It was a matter of no moment to the defendant company what may have been the intention of the plaintiff with respect to future changes in the course of the stream upon her own land. After the defendant company had built its road, adapting it to the then existing conditions, no change could have been thereafter made in the location of the stream affecting injuriously its rights. To all appearances, when the road was located the then existing arrangement, which had been in existence for a number of years, was a permanent one, and the company not only had the right, but it was its duty in constructing its road, to adapt itself to conditions as they then existed. It could have safely provided a passage for the water from the wasteway, because, having adapted itself to the state of things created by the plaintiff, she could not thereafter have changed those conditions to the injury of the company without its consent. The plaintiff could not afterwards have changed the location of the canal or wasteway and required the company to construct a culvert at another place. Upon familiar principles she would have been estopped from making such a demand.

In 3 Farnham on Waters and Water Rights, sec. 827c, it is

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said: "If a land owner makes a change in the course of a stream which to all appearances is permanent, and holds out to the world the representation that such condition is permanent, he will be bound by his act, and after other persons have acquired rights by changing their positions upon the faith of such representations, he will not be permitted to deny that the stream is not flowing in its true channel." And in the same connection it is said: "When a channel is cut to straighten a water course, and the water flows in the new channel for a number of years, a railroad company, in constructing its road through the property is bound to treat the new channel as the water course and cannot obstruct it to the injury of adjoining owners."

The water which, in times of freshets, flowed through the wasteway, was, so far as it concerned the obligations of the defendant with respect thereto in constructing its road, to all intents and purposes natural water, and, upon the principle announced in *N. & W. Ry. Co. v. Carter*, 91 Va. 587, 22 S. E. 517, it was the duty of the defendant company to make provision for it. The authorities hold that the flood-water which overflows from a natural stream is not surface water, and that the failure of a railroad company to make culverts in an embankment constructed by it for its road-bed, on lands subject to such overflow, of sufficient size to permit the water behind the embankment to rise and fall as fast as the stream does, is negligent and unskilful construction, making the company liable in damages for resulting injury. *Uhl v. Railroad Co.*, 56 W. Va. 494, 49 S. E. 378, 68 L. R. A. 138, 107 Am. St. Rep. 968; *O'Connell v. Ry. Co.*, 87 Ga. 246, 13 S. E. 489, 73 L. R. A. 394, 27 Am. St. Rep. 246. And this court has held that even surface water, when flowing in a natural channel, must be dealt with by a railroad company in constructing and maintaining its road as if it were water flowing in a natural stream. *N. & W. Ry. Co. v. Carter*, *supra*.

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The court having erred in giving to the jury instruction No. 4, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

*Reversed.*



## Wytheville.

MERCHANT. & MINERS TRANSPORTATION CO. v. MASURY.

June 13, 1907.

1. DEMURRER TO EVIDENCE—*Demurrer Overruled—Verdict Set Aside—New Trial.*—When a demurrer to evidence is overruled, but the conditional verdict of the jury is set aside for lack of evidence to support it, the trial court should, upon request of the demurrant, permit him to withdraw his demurrer to the evidence, and direct a new trial of the whole case, and not simply award an inquiry of the damages sustained.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Hughes & Little*, for the plaintiff in error.

*A. Johnston Ackiss*, for the defendant in error.

KEITH, P., delivered the opinion of the Court.

Masury, the defendant in error, brought a suit in the Court of Law and Chancery of the city of Norfolk against the Merchants & Miners Transportation Company, to recover damages for injury to goods shipped from Boston, Mass., to the city of Norfolk.

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The defendant pleaded not guilty, and after the evidence was put before the jury upon this issue the defendant demurred and the jury assessed the plaintiff's damages at \$714.50, subject to the decision of the court. Thereupon the defendant moved the court to set aside the verdict and grant it a new trial, upon the grounds that the verdict is contrary to the law and the evidence, that the damages are excessive, and that there is no evidence of the proper measure of damages upon which to base a verdict. The court set aside the verdict, but refused to grant a new trial. It awarded, however, a writ of inquiry to assess the damages, and entered a judgment that plaintiff should recover of the defendant "what damages he ought to recover, and that the amount of such damages should be assessed by a jury." The defendant then, by its attorneys, after the refusal of the court to grant it a new trial, and before the jury were sworn to try the writ of inquiry, moved the court to allow it to withdraw its demurrer to the evidence, and asked that a new trial should be granted it on the facts, both as to its liability and as to damages; but the court overruled the motion of the defendant and refused to allow it to withdraw its demurrer to the evidence. And thereupon the jury empaneled to assess the damages found a verdict in favor of the plaintiff for \$404.10, upon which judgment was entered, and to that judgment a writ of error was awarded by this court.

A similar question was recently before this court, in *N. & W. Ry. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 908, but in that case a bill of exception was taken by the defendant in error to the ruling of the court setting aside the first verdict as being unsupported by the evidence, and this court, holding that there was error in setting aside the verdict, and that the evidence was sufficient to support it, entered judgment upon that verdict in behalf of defendant in error; and it was thereby rendered unnecessary to dispose of the question here presented.

The position of plaintiff in error here is that, in order to maintain a judgment against it, it was necessary to show that

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it had been negligent as a common carrier with respect to the goods committed to its care, that the defendant in error had suffered damage by reason of that negligence, and the amount of damage thus sustained; that in the case before us these questions were so intimately blended that when the testimony closed, being of opinion that the evidence was insufficient to authorize a jury to find a verdict assessing damages against it, it had interposed a demurrer to the evidence; that the jury had found a verdict against it upon insufficient testimony, as it claimed, and that claim the trial court sustained, and the verdict assessing the damages was set aside.

Under such circumstances we are of opinion that after the verdict was set aside defendant should have been permitted to withdraw its demurrer to the evidence, and that a new trial should have been awarded, both as to the fact of liability and as to damages. The insufficiency of the evidence to establish the damages awarded by the jury in their first verdict was the inducement to plaintiff in error to interpose a demurrer to the evidence, and if the defendant in error (plaintiff in the court below) was permitted to introduce further evidence, tending to make out one of the necessary elements in his case, it seems to us it would have been nothing but equal justice to have permitted the same privilege to the plaintiff in error, who was the defendant in the court below.

We have been referred to no authority by counsel, nor have we been able to find any, either in any text-writer or in the adjudicated cases, directly bearing upon the subject.

The reference to 4 Min Inst. (3rd ed.), 922, (where it is said that according to our practice, "the jury is not discharged, as in England; but they generally find a verdict subject to the demurrer to evidence. If the jury assess damages for the plaintiff, thus hypothetically, and upon considering the demurrer, the court is of opinion that the plaintiff has cause of action, but that the damages are excessive, the verdict may be set aside, and a writ of inquiry awarded,") does not reach the

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essential merit of this case, which is that the deficiency of the proof upon the measure of damages, alleged by the plaintiff in error and concurred in by the court, was the controlling influence which induced the plaintiff in error to demur to the evidence; and that opportunity ought to have been afforded to it, as well as the defendant in error, to amend its case by the introduction of further evidence, if it could do so, or if the case against it was changed by additional evidence, giving it the choice of trusting its case to the jury rather than to resort under changed conditions to the demurrer to the evidence.

For these reasons we are of opinion that the judgment should be reversed, and a new trial awarded.

*Reversed.*

Statement.

**Wytheville.**

WICKHAM & NORTHROP, RECEIVERS, v. THE RICHMOND  
STANDARD STEEL, SPIKE & IRON CO.

June 13, 1907.

1. LANDLORD AND TENANT—*Rent—Use of Personal Property as Part of Consideration.*—The presence of personal property upon land, to be used in immediate connection with the land and essential to its enjoyment for the purposes for which the land is leased, may immeasurably increase the rental value of the land, and the return for the use of both properties may be stipulated for as rent, and, in case of default, may be distrained for.
2. LANDLORD AND TENANT—*Lease—Mill Site and Water—Separate Values—Distress for Whole.*—It is unnecessary, in this case, to determine whether or not water drawn from a natural stream and conveyed into a permanent, artificial canal, and appropriated to useful purposes, is *per se* demisable, for where, as in this case, the covenants in a lease of a mill site, with sufficient water from an artificial canal to operate the mill, are interdependent, the mere fact that the parties have chosen to fix separate values on the use of the land and of the water, is immaterial, and the whole may be recovered by distress.
3. LANDLORD AND TENANT—*Distress—Abandonment—Second Distress—Character of Statutory Distress.*—The abandonment of a distress warrant for rent actually due, after levy and before removal or sale of the property, or other injury to the tenant, is no bar to a second distress warrant for the same rent under the statutes of this State, even if it were otherwise at common law. The proceeding under the statute is judicial in its character, and the rights of the tenant are thoroughly protected. The landlord is no longer "his own carver," as at common law.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendants assign error.

*Reversed.*

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Opinion.

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The opinion states the case.

*H. Taylor, Jr., and Eppa Hunton, Jr., for the plaintiff in error.*

*Wm. L. Royal, for the defendant in error.*

WHITTLE, J., delivered the opinion of the Court.

The object of this action is to recover damages from the plaintiffs in error for the alleged illegal levy of a distress for rent upon the property of the plaintiff.

The lessors, who were predecessors in title of the defendants, demised to the lessee, through whom the plaintiff claims, a lot or boundary of land in the city of Manchester, adjoining their canal, for a mill site, together with sufficient water from the canal to operate the mill and machinery which the lessee was to erect and install upon the premises. The lease was for the term of twenty-five years, at an aggregate annual rental of \$2,300, of which sum \$275 was apportioned to the land, and \$2,025 to water. In the year 1905, the arrearage of the plaintiff under the lease amounted to \$2,978.96; whereupon, the defendants caused a distress warrant to be levied upon the property of the plaintiff on the premises for the amount due. The articles levied on were advertised for sale, but were not sold or removed; and it appearing that the property was subject to mortgage, as against which, by statute, it was not liable for more than one year's rent, the levy was released and the warrant dismissed. Subsequently another warrant was issued for one year's rent and levied on substantially the same property, which was sold, and upon that proceeding this action is founded. To an adverse verdict and judgment the defendants bring error.

The dominant contentions in the case, both of which were resolved in the plaintiff's favor, are: (1) That the stipulated

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compensation for the use of water does not constitute rent, and, therefore, was not collectible by distress; and (2) that the abandonment of the first levy was a bar to the second.

With regard to the first proposition it may be remarked, that it is not possible to read the agreement of the parties as a whole without being sensible that it was their intention to treat the return for both land and water as *rent*. Though the consideration for the use of the land and water respectively are embodied in separate clauses of the same instrument, the lease was for a special purpose which would have been wholly defeated by the failure of either element of the consideration; each forms an indispensable part of the whole, the substance of the subject matter of the contract, and they are consequently not severable. *Rogers v. Pattie*, 96 Va. 501, 31 S. E. 897. The spike-mill and machinery, destitute of water to operate them, would have been as valueless as a water grist-mill under like conditions.

Unquestionably the rental for land may be immeasurably increased by the presence of personal property upon it, the consideration for the enjoyment of which may be included in the lease. In such case, the return from the use of both properties is considered to be rent, upon the assumption that the entire rent issues out of the land, while the benefit of the personality is an incident which enhances its value.

In *Mickle v. Miles*, 31 Penna. St. 20, the court said: "The ordinary definition of a rent as a profit issuing yearly out of lands and tenements corporeal, is defective in overlooking some of the cases that belong to the class; as where a furnished house or stocked farm is leased, which are common cases. 5 Bos. & P. 224; 5 Co. 16, b; Leon. 42. In such cases the personal property is really a part of the consideration of the rent, and it is only by a fictitious accommodation of the case to the defective definition that it can be said that the rent issues exclusively out of the land."

So in *Fernwood Masonic Hall Asso. v. Jones*, 102 Penn. St.

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307, where the lessee covenanted to pay the lessor for all gas consumed on the premises, it was held that arrearages for gas were rent and might be distrained for. In that case it was said that the stipulations for the rent of the building and to pay for the gas were in immediate connection, and the covenant to pay for the gas was as much a part of the rent as would have been a covenant to pay taxes on the premises during the term.

In *Sutliff v. Atwood*, 15 Ohio St. 186, where the lease was of a dairy farm with stock upon it, and in *Baldwin v. Walker*, 21 Conn. 168, the lease of a factory and fixtures, it was held that the consideration received for both properties was to be regarded as rent. See also 18 Am. & Eng. Ency. L., 260, n. 2.

To the same effect are the decisions in this State.

Thus in *Newton v. Wilson*, 3 Hen. & Mun. 470, "a lease was made of a mill, together with a tract of land adjoining and a black man as a miller, for a term of years, rendering an annual rent; the miller had previously to the lease been emancipated by the lessor," and the lessee was allowed an abatement of rent.

In *Williams v. Haywood*, 3 Munf. 277, it was said: "In a lease of a tract of land, with sundry slaves and other personal property, reserving by way of rent, a gross sum payable annually, the remedy by distress may be resorted to, without any express stipulation."

So also, in the case of *Mickie v. Wood*, 5 Rand. 571, the principle is recognized that in a lease of land and personalty, the consideration reserved does not lose its character of rent from the circumstance that personal property is embodied in the lease.

It is not necessary in this case to determine whether water lawfully withdrawn from a natural stream and conveyed into a permanent artificial channel and appropriated to useful purposes is *per se* demisable. However that may be, we are of opinion that the agreement in question comes fully within the influence of the doctrine announced by the authorities cited.



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The covenants in the lease for the mill site with sufficient water from the canal to operate it are inter-dependent covenants, and the mere fact that the parties have chosen to fix separate values upon the use of the land and water cannot dissociate the properties and destroy the mutual dependence of the connecting stipulations. The associated use of the properties constitutes the base upon which the enterprise which gave birth to the agreement rests. Both are indispensable to the success of the plan, and the withdrawal of either would defeat it. Consequently, the covenants are not severable, but form a joint and indivisible consideration for the lease. It would be mere juggling with words to say, that if the lessors had reserved a rental of \$2,300 *per annum* for the mill site with the additional privilege to the lessee of withdrawing sufficient water from the canal to run the mill, the consideration would be rent, yet to hold that, though precisely the same result is attained by apportioning the consideration for the land and water, the sum reserved for water loses its character of rent—an attribute with which it is impressed by reason of its union with the land.

Under the principle of the cases referred to, the extent of the enhancement of value of the premises to the lessee from the use of the personalty is immaterial; it is the fact that the properties are inseparably blended together in the same lease and moved the parties to enter into the agreement that clothes the entire consideration with its character of rent.

It is not necessary to decide how far this court, in the beginning of the twentieth century, would adhere to the narrow definition of rent which obtained in the time of Lord Coke, that it only issued out of "things manurable," (Hargraves's & Butler's Co. Litt., 44b.); for, as we have seen, the case falls within the well recognized exception to the common law rule, namely, that personal chattels in union with and essential to the purposes for which the land is leased are demisable. 1 Taylor's Landlord & Tenant (9th ed.) sec. 18.

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The remaining proposition, that the abandonment of one sufficient levy under a distress warrant for the same rent constitutes a bar to the second levy, is admittedly a correct statement of the general rule of the common law. At common law the landlord was his own executioner, "his own carver;" the proceeding was the sole act of the landlord, and the tenant who was at his mercy was not liable to be twice vexed for the same rent. 1 *Taylor's Landlord & Tenant* (7th ed.), sec. 733; *Bagge v. Mawby*, 8 Exch. 649; *Dawson v. Crapps*, 50 Eng. C. L., 961; *Sear v. Caldicott*, 45 Eng. C. L., 123; *Quinn v. Wallace*, 6 Whart. (Pa.) 452.

Altogether different conditions prevail at present with respect to distress warrants. The proceeding under the statute is judicial in its character, and the rights of the tenant are thoroughly safeguarded. Ch. 177, Va. Code, 1904. But even the strict rule of the common law was subject to the exception that for justifiable cause the landlord might abandon the first distress and distrain again for the same rent. *Everett v. Neff*, 28 Md. 176, 186; 24 Cyc. 1295; *Brooks v. Wilcox*, 11 Gratt. 411.

In this instance there is no evidence of a wrongful distress wantonly made. The arrearages distrained for were confessedly due, and under the first warrant the property levied on, though advertised for sale, was not removed from the premises. The right of the lessors to distrain for the water-rent was denied, and they were threatened with an action for damages if they resorted to that remedy. The first warrant was for more than one year's rent, and the lessors, discovering that the property was under a mortgage, were doubtless of opinion (perhaps erroneously) that it would be more regular to issue a warrant for one year's rent only. Va. Code, 1904, sec. 2791. The lessors would be liable for any injury that may have been occasioned by the levy of the first distress warrant, but it cannot, upon the facts of this case, constitute a bar to proceedings under the second warrant.

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The rulings of the trial court on these controlling questions render a new trial along other lines inevitable, and make it unnecessary to notice the remaining assignments of error.

For these reasons the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

*Reversed.*

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Statement.

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**Wytheville.****BOWLES AND ANOTHER V. RICE AND OTHERS.**

June 13, 1907.

1. **PRINCIPAL AND AGENT—Powers of Special Agent.**—A special agent is one who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. His powers are to be strictly construed. He possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred, and must keep within the limits of his commission. All persons deal with such an agent at their own risk as to the extent of his powers.
2. **PRINCIPAL AND AGENT—Special Agent—Power to Sell for Cash—Sale on Time.**—A power to a special agent to sell for cash at any time within thirty days, does not authorize a sale on credit, even though the credit does not extend beyond the thirty days. A mere power to sell without more, implies a cash sale.
3. **CUSTOM—Burden of Proof—Knowledge of Custom.**—The burden of upon the party alleging a custom to prove it by satisfactory evidence. Furthermore, knowledge of the existence of the custom must be brought home to the party to be affected thereby, unless the evidence shows that it is so uniform and notorious at the place where he resides as to raise a *prima facie* presumption that he knew of it.

Appeal from a decree of the Law and Equity Court of the city of Richmond. Decree for defendants. Complainants appeal.

*Reversed.*

The opinion states the case.

*Conway R. Sands* and *W. D. Cardwell*, for the appellants.

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*A. B. Dickinson, A. L. Holladay and R. R. Florance*, for the appellees.

WHITTLE, J., delivered the opinion of the Court.

This appeal is from a decree adverse to the plaintiffs in a suit to set aside a sale of standing timber, made by a special agent, W. D. Rice, to the appellee, E. J. Thomas, and afterwards assigned by Thomas to the appellees, Taliaferro & Co., to enjoin the buyers from cutting and sawing timber upon plaintiffs' premises, and for other relief.

By written authority Rice was empowered to sell, within thirty days from September 1, 1905, the timber on the plaintiffs' farm for \$1,100 cash, the plaintiffs agreeing to execute a proper deed to the purchaser, and to allow two years for its removal. Subsequently a power of attorney was prepared (which the plaintiffs declined to sign), authorizing Rice, upon the same consideration to sell all timber "eight inches and over across the stump," and granting the purchasers the privilege, while cutting and sawing that timber, "of sawing logs brought from nearby tracts."

On September 2, 1905, Rice entered into an agreement with Thomas, in consideration of \$1,100 in effect payable within twenty-eight days from date, by which he sold him "all timber of every character and description" on the plaintiffs' farm, "with the usual rights as to facilities for cutting and sawing and hauling said timber and the lumber made therefrom."

The sole question demanding our consideration is whether Rice, who was confessedly a special agent acting under a written power, exceeded his authority in making the foregoing agreement with Thomas.

The law applicable to the case is clear and well settled. A special agent is defined to be one "who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done."

## Opinion.

1 Am. & Eng. Enc. L., 985. Persons dealing with such agent do so at their own risk, and cannot rely upon his assumption of authority, but must inform themselves of the extent of his powers.

The rule is thus stated in *Stainback v. Read*, 11 Gratt. 281, at p. 286, 62 Am. Dec. 648: "It is equally well settled that a party dealing with an agent acting under a written authority must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him; and he must at his peril observe that the act done by the agent is legally identical with the act authorized by the power." Citing *Story or Agency*, sec. 57, *et seq.*; *Atwood v. Munnings*, 7 Barn. & Cress. 278; *Bank v. Aymar*, 3 Hill (N. Y.) 262; *Hewes v. Doddridge*, 1 Rob. 143; 1 Am. L. C. 392, notes. See also *Stillman v. Fredericksburg &c. Ry. Co.*, 27 Gratt. 119; *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414; *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35; *Simmons v. Kramer*, 88 Va. 411, 13 S. E. 902; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

It is also settled law that the powers of a special agent are to be strictly construed; he possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred, and must keep within the limits of his commission. *Hotchkiss v. Middlekauf*, 96 Va. 653, 32 S. E. 36, 43 L. R. A. 806; *Winfree v. Bank*, 97 Va. 83, 87, 33 S. E. 375. It is moreover the accepted rule, that, in the absence of authority to the contrary, a power to sell implies a cash sale, (*Burks v. Hubbard*, 69 Ala. 379; 1 Am. & Eng. Enc. L., 1014; 24 Id., 1095, and authorities cited, n. 10) and *a fortiori* the terms of a power expressly prescribing a cash sale must be rigidly observed.

In *Halsey v. Monteiro*, *supra*, it was held that a sale for one-third cash is not satisfied by an agreement to pay within sixty days.

Tested by the foregoing principles, we are of opinion that

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Rice exceeded his authority in two essential particulars. As we have seen, the power expressly provides for a sale for cash, and also limits the authority of the agent to a sale of the timber, the purchaser to have two years within which to remove it. This was the extent and measure of his authority, and in disregard of the explicit directions of the power under which he was acting, Rice sold the timber on twenty-eight days' time, and authorized the buyer to locate a saw-mill on the premises and convert the timber into lumber.

The propositions that "the sale was for cash in the eye of the law," and that the privilege of sawing the timber into lumber is a "customary consequence of the sale," cannot be maintained. It is true the instrument was to be binding upon the principals for thirty days from September 1, 1905—that is to say, at any time within thirty days from that date the agent was empowered to effect a *cash sale* of the timber. But by no fair construction can the power be held to confer upon Rice authority to sell on time, even though the credit given might not extend beyond the thirty days. If the opposing theory be sound, the terms of a power (binding on the principal for twelve months) which authorized a *cash sale* would be complied with by a *credit sale*, provided the day of payment was within the year.

With respect to the second proposition, the privilege of locating a saw-mill on the premises, and of transforming the timber into lumber, admittedly does not pass to the buyer "by virtue of anything contained in the contract," but depends upon an alleged custom. The appellees, in that connection, rely upon *Allen v. Crank*, 2 Va. Dec. 279, 23 S. E. 772, to sustain their right to locate a saw-mill on the premises. So far from upholding that pretension, the case shows that the privilege rested upon compact and not upon custom; and it likewise shows that the burden in such case is on the party alleging the existence of a custom to prove it. This the defendants have failed to do, but rely wholly upon the affirmative allegations of their answer to establish the fact.

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A custom cannot be set up in that way, but must be proved by satisfactory evidence. Furthermore, knowledge of the existence of the custom must be brought home to the plaintiffs, unless the evidence shows that it is so uniform and notorious at the place where the parties to be affected by it reside, as to raise a *prima facie* presumption that they knew of it. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.

For these reasons, we think the decree appealed from is erroneous and should be reversed; and this court will enter a decree setting aside the contract of sale of the timber and perpetuating the injunction. But this disposition of the case is without prejudice to the right of the appellants, if so advised, to proceed at law to recover such damages, if any, as they may be entitled to by reason of the acts complained of.

*Reversed.*



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Statement.

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**Wytheville.**

TALIAFERRO v. SHEPHERD.

June 13, 1907.

Absent, Keith, P.

1. **NEW TRIAL—Variance Between Allegation and Proof—Failure to Object to Evidence—Waiver.**—A verdict will not be set aside on account of a variance between the allegation and the proof, where the party making the motion made no objection to the admissibility of the evidence when offered, and submitted no motion to exclude it afterwards, but, on the contrary, accepted the issue irregularly tendered, and undertook to maintain his side of the case by countervailing testimony. The objection will be deemed to have been waived.
2. **NEW TRIAL—After-Discovered Evidence—Diligence.**—A motion for a new trial, on the ground of after-discovered evidence, will be overruled, where, as in this case, the proffered evidence was not newly discovered, or could have been produced at the former trial by the exercise of reasonable diligence.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Meredith & Cocke*, for the plaintiff in error.

*Henry R. Pollard* and *George C. Gregory*, for the defendant in error.

WHITTLE, J., delivered the opinion of the Court.

## Opinion.

This action of trespass on the case was brought by W. T. Shepherd, the defendant in error, against the City of Richmond, W. E. Cutshaw, City Engineer, and his assistant, P. P. Taliaferro, the plaintiff in error, to recover damages for the alleged wrongful act of the defendants in raising the grade line of the sidewalk and street in front of the plaintiff's dwelling, by filling in earth, stone and gravel.

The trial resulted in a verdict in favor of the city and Cutshaw, and an adverse verdict and judgment against Taliaferro; and upon his petition this writ of error was awarded.

The chief ground of complaint is that, in the absence of any averment in the pleading to that effect, the jury were instructed and based their finding upon the pretension that the grade line given by Taliaferro to the contractor charged with the construction of the dwelling was erroneous, which error it is alleged occasioned the damage sustained by the plaintiff. In other words, the gist of the charge, which practically permeates all the assignments of error, is that there has been a material departure in the evidence and instructions from the cause of action set out in the declaration.

Conceding, as an original proposition, that the procedure was amenable to that objection, it is, nevertheless, clear that Taliaferro is estopped by his conduct from relying upon that ground of exception. He made no objection to the admissibility of the evidence when offered, and submitted no motion to exclude it; but, on the contrary, accepted the issue irregularly tendered by the plaintiff, and undertook to maintain his side of it by countervailing testimony. He took chances of winning on that issue, and having lost, upon familiar principles, his objection must be considered as waived. *S. V. R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Richmond Ry. &c. Co. v. West*, 100 Va. 188, 40 S. E. 643; *Portsmouth St. R. Co. v. Peed*, 102 Va. 662, 47 S. E. 850; *N. N. & O. P. Ry. &c. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281. There was also an

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express waiver by Taliaferro of objection to the consideration by the jury of evidence tending to show that he gave the grade line in question upon verbal rather than written application, which eliminates that feature of the case.

We, therefore, concur in the opinion of the trial court, that the real question in the case at trial was whether Taliaferro furnished Tignor, the contractor, a correct grade line—which issue, as observed, was distinctly submitted to the jury upon conflicting theories of the evidence on correct instructions, and was resolved in behalf of the plaintiff—and that the contention of the defendant, that he was surprised and placed at disadvantage by the variance between the pleading and evidence, is not sustained by the record.

The remaining assignment of error demanding our attention involves the action of the court in over-ruling the motion of the defendant for a new trial, on the ground of newly-discovered evidence.

It appears by affidavits filed in that connection, that, after the jury had returned their verdict, affiants dug into the gravel sidewalk in front of plaintiff's residence, and discovered that the cinder walkway was not eighteen inches below the surface of the present sidewalk, as alleged in the declaration and testified by the plaintiff, but that the true depth was only seven and one-quarter inches. The consideration of the defendant was directed to the plaintiff's contention in regard to the extent of the gravel, both by the pleading and evidence, and his attention was specially called to the identical method of ascertaining the correct quantity of material above the cinder, subsequently adopted, by one of his own witnesses who made that suggestion in his testimony before the jury. The evidence was concluded April 26, the verdict rendered May 6, which afforded the defendant ample time to have procured this piece of evidence and submitted it to the jury. Nevertheless, the test thus repeatedly brought to his notice before verdict was not made until May 13.

It cannot be affirmed of these undisputed facts, that the evi-

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dence relied on was either newly-discovered, or that it could not have been produced at the former trial by the exercise of reasonable diligence; yet the concurrence of these circumstances is essential, under the established practice in this State, to entitle a litigant to a new trial on that ground. Our reports contain many cases illustrative of the well settled rule, among which attention may be called to the following: *St. John v. Alderson*, 32 Gratt. 140; *Tate v. Tate*, 85 Va. 205, 7 S. E. 352; *Field v. Com'th*, 89 Va. 690, 693, 16 S. E. 865; *Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. 830; *Wright v. Agelesto*, 104 Va. 159, 51 S. E. 191.

Upon the whole case, we are of opinion that the judgment ought to be affirmed.

*Affirmed.*

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Opinion.

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**Wytheville.**

## WESTERN UNION TELEGRAPH CO. v. CHILES.

June 13, 1907.

1. **APPEAL AND ERROR.**—*Constitutional Question as Ground of Jurisdiction.*—Where the trial court has held an act of assembly to be constitutional, and the only ground of appeal to this court is the unconstitutionality of the act, if this court finds the act to be constitutional, that is the only question it can consider under the express mandate of the Constitution.
2. **TELEGRAPH COMPANIES.**—*Failure to Deliver Message—Penalties—Constitutional Law.*—If a telegraph company fails to deliver promptly a telegram sent from one point to another within this State, it is liable to the penalty imposed by section 1294h of the Code (1904), although the receiving point be a navy yard, under the exclusive legislative jurisdiction of the Federal Government. All subjects of legislation not prohibited by the Federal and State Constitutions are within the discretion of the General Assembly, and this subject is not so prohibited.

Error to the judgment of the Hustings Court of the city of Portsmouth in an action of debt. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Hughes & Little*, for the plaintiff in error.

*W. D. Stoakley*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the Court.

This proceeding was instituted by Samuel Chiles against the

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Western Union Telegraph Company to recover the penalty of one hundred dollars imposed by clause 6, section 1294h. of the Code of 1904, for failure to deliver a telegraphic message sent by W. F. Hamburger from the city of Richmond, addressed to "Gunner Samuel Chiles, U. S. S. Albarenda, Navy Yard, Norfolk, Va." There was a verdict and judgment in favor of the plaintiff, and to that judgment this writ of error was awarded.

As the jurisdiction of this court to review the judgment complained of depends solely upon the unconstitutionality of the clause of the section under which the penalty was imposed, the first question to be considered is whether or not that clause is constitutional, and if it be found to be constitutional it is the only question that we can consider. Const. sec. 88; *Postal Tel. Co. v. Umstadter*, 103 Va., 742, 748-9, 50 S. E. 259.

The ground upon which it is claimed that the Act is unconstitutional is that the United States has exclusive legislative jurisdiction over the territory embraced within the limits of the Norfolk Navy Yard, formerly the Gosport Navy Yard, acquired by purchase under the provisions of Acts of Assembly passed January 25, 1800, and February 27, 1833. (Acts 1800. p. 246, and Acts 1832-3, p. 25).

If it be conceded that the United States has this exclusive legislative jurisdiction over the Norfolk Navy Yard, as claimed by the counsel of the Telegraph Company, what provision in either the Federal or State Constitution expressly or impliedly inhibits the General Assembly from imposing the penalty in question?

It was conceded in oral argument (and if it had not been we think it is clear) that the statute is not in conflict with the commerce clause of the Federal Constitution. Article I, Sec. 8, cl. 3. The statute, as applied to the facts of this case, does not in any way attempt to regulate commerce with a foreign nation, among the States, nor among the Indian tribes.

We have been cited to no provision in either Federal or

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State Constitution, nor have we found any, which prohibits the legislation in question. The Telegraph Company was doing business in the State. The contract to deliver was made in the State. The fact that the message was to be delivered at a point over which the State had no legislative jurisdiction would not render the Act unconstitutional unless forbidden (which, as we have seen, it was not) by the Federal or State Constitution, for it is well settled that all subjects of legislation not prohibited by the Federal or State Constitutions are within the discretion of the General Assembly. *Com'th v. Drewry*, 15 Gratt. 1, 5; 8 Cyc. 774-5.

The imposition of a penalty upon a telegraph company for failure to deliver a message at any point within the territorial limits of the State does not seem to us to be unjust or unwise legislation, but if it were, the remedy is with the General Assembly and not with the courts.

The judgment complained of must be affirmed.

*Affirmed.*

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Statement.

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**Wytheville.**

NOTTINGHAM &amp; ANOTHER v. ACKISS.

June 13, 1907.

1. **BILLS AND NOTES—Collateral Agreement in Separate Paper—Construction—Assignment.**—Where, at the time a negotiable note is made, an agreement in writing is executed by the maker and the payee of the note, which is therein declared to be a part and parcel of the note, by which it is declared that the note is only to be payable on certain conditons, the two writings together constitute the contract between the parties, and if both of them are endorsed by the payee and delivered to a third person, he acquires thereby only such rights as the payee of the note had.
2. **PLEADING—Debt—Nil Debet—Scope.**—If an action of debt be brought on a negotiable note against the maker thereof, and the defense is that there was annexed to the note, as a part and parcel thereof, an agreement in writing, stipulating that the note should only be payable on certain conditions, which had not been fulfilled, the defense may be made under the plea of *nil debet*. No special plea is necessary.
3. **APPEAL AND ERROR—Objections not made until after Verdict—Reversal on other Grounds.**—Whether or not detaching a negotiable note from an agreement annexed to it, and qualifying its terms, and bringing suit on the note alone, is such an alteration as avoids the contract, ought not now to be considered by this court in this case, as it appears that the question was not raised in the trial court until after verdict against the makers, and the case is reversed and remanded for a new trial on other grounds.

Error to a judgment of the Law and Equity Court of the city of Norfolk in an action of debt. Judgment for the plaintiff. Defendants assign error.

*Reversed.*

The opinion states the case.



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Opinion.

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*Burroughs & Bro.*, for the plaintiff in error.

*Wm. McK. Woodhouse*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the Court.

On the 2nd day of July, 1905, the plaintiff in error and O. E. D. Barron made their promissory note, payable to the assignor of the defendant in error, of which the following is a copy:

“Norfolk, Va., July 2nd, 1905.

“790.00,

“On demand, We promise to pay to the order of Charles F. Hodgman negotiable and payable, without offset, at Seaboard Bank, Incorporated, of Norfolk, Virginia, Seven hundred and ninety . . . . Dollars, for value received, with costs of collection or any attorney’s fees, if incurred, in case payment shall not be made at maturity; and we, the maker or makers, endorser or endorsers, hereby waive the benefit of our Homestead Exemption as to this debt.

F. E. NOTTINGHAM and  
JAMES T. NOTTINGHAM,  
O. E. D. BARRON.”

At the same time the parties to the note entered into the following agreement:

“This agreement, made and entered into, in duplicate, this 2nd day of July, in the year 1905, between Charles F. Hodgman, party of the first part, and F. E. Nottingham, James T. Nottingham and O. E. D. Barron, parties of the second part.

“Whereas, the said party of the first part has, by deed of even date herewith, sold and conveyed unto the parties of the second part thirteen lots of land, set out and described in said deed, for the price of \$1,190, of which \$400 has been paid in

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cash, and the balance of said purchase price to-wit: \$790, is evidenced by the attached note.

"And whereas, it has been agreed by and between the said parties that the said sum of \$790 is to be paid to the said party of the first part out of the proceeds of the sale of the said thirteen lots of land as the same may be sold by the said parties of the second part.

"Now, therefore, this contract, which is executed as a part and parcel of the said attached note for \$790, witnesseth, that the said party of the first part agrees that he will not demand payment of said note for \$790, and hereto attached, except and until sale may be made of said thirteen lots of land, or any part thereof, but shall only demand payment of such and all sums as may be realized upon a sale of said lots of land, in whole or in part, as the same may be sold.

"The said parties of the second part agree to pay to said party of the first part all and any sums of money which may arise out of the sale of said lots, in whole or in part as the same may be sold, and further agrees to use all due diligence in effecting sale thereof.

"Witness the following signatures and seals.

"C. F. HODGMAN. (Seal.)

"F. E. NOTTINGHAM. (Seal.)

"JAMES T. NOTTINGHAM. (Seal.)

"O. E. D. BARRON. (Seal.)"

"Witness:

"WM. MCK. WOODHOUSE."

The payee in the note endorsed and delivered these writings to the defendant in error, who instituted the action of debt on the note alone, no reference being made in the declaration to the agreement. The plaintiffs in error pleaded the general issue and tendered three special pleas, the first and third of which were rejected.

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Upon the trial of the cause, the defendant in error offered in evidence the note without the agreement and rested. The plaintiffs in error introduced the agreement in evidence. Upon these writings and the other evidence before the jury there was a verdict and judgment in favor of the defendant in error for the amount of the note sued on. To that judgment this writ of error was awarded.

Numerous errors are assigned, but in the view we take of the case it will be unnecessary to deal with them specifically. The decision of the case turns upon the effect of the agreement of July 2, 1905, upon the note sued on.

It is well settled by the decisions of this court that a writing endorsed on a bond at the time of its execution, operating in favor of the obligor and signed by the obligee, is to be considered as part of the condition of the bond. *Peyton v. Harman*, 22 Gratt. 643, 645; *Smith v. Spiller*, 10 Gratt. 318; *Price v. Kyle*, 9 Gratt. 247; *Shermer v. Beale*, 1 Wash. 11, 14; *Gordon v. Frazier*, 2 Wash. 130.

The case of *Carter v. Noland*, 86 Va. 568, 10 S. E. 605, 6 L. R. A. 693, in which it was held that to make a *subsequent agreement* respecting a bond a part thereof, it must be so engrafted upon the bond that the original and engrafted matter shall constitute inseparable parts of an entire instrument, does not question the correctness of the decisions of this court cited above, but only that the principles announced by them ought not to be extended to a case where the endorsement on the bond amounted to no more than a mere promise to refrain from the exercise of a *matured right* for a limited time.

The note sued on and the agreement to which it was attached were made at the same time, and the latter in terms expressly declares that it was executed as part and parcel of the note. It is clear, therefore, that the two writings together constitute the contract between the original parties to them, and that the defendant in error only acquired such rights by their endorse-

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ment and delivery to him as the payee in the note had. The declaration set out a contract to pay money on demand and absolutely when it was only payable on certain conditions. To put that question in issue a special plea was not necessary—the general issue (*nil debet*) did that, and upon it there should have been a verdict for the defendants. *Newell v. Maybury*, 3 Leigh 250, 253, 23 Am. Dec. 261; *Smith v. Spiller*, 10 Gratt. 318, 322. The verdict of the jury in favor of the plaintiff should, therefore, have been set aside and a new trial awarded, upon the motion of the defendant.

Whether or not detaching the note from the said agreement and bringing suit upon the note alone was such an alteration of the contract, within the meaning of our decisions or sec. 2841a, Art. VIII. of the Code (1904) as would avoid the contract ought not to be considered by this court at this time. That question was not raised in the trial court until after verdict, upon motion for a new trial and in arrest of judgment, when the plaintiff had no opportunity to explain the circumstances under which the alleged alteration was made.

It is unnecessary, and might be improper, to consider any of the other assignments of error, as upon the next trial the issues and proof may, and most probably will be different.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded, with leave to the plaintiff, if he be so advised, to amend his declaration, and for a new trial.

*Reversed.*

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Statement.

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**Wytheville.****VEITCH v. JENKINS.**

June 13, 1907.

1. **TRIAL**—*Construction of Written Contract for the Court.*—Where the relation of the parties to a contract depends upon a written contract, unambiguous in its terms, and this fact is to be determined in an action at law, brought by one of said parties against a third person, it is the province of the court to construe the contract, and, as a matter of law, to determine the relation between the parties.
2. **MASTER AND SERVANT**—*Independent Contractor—Privity—Case at Bar.*—Where a contractor enters into an agreement with the owner of a lot, whereby he engages to purchase the material, employ the labor, and superintend and erect a building for the owner, in accordance with plans in hand, and at an agreed price, and to render a true account of purchases and pay-rolls; to use his best efforts to secure material and labor at the lowest cost; and guarantees that the workmanship shall be first-class in every respect; and in consideration thereof, the owner agrees to pay the net cost of the material and labor, and to pay the contractor a stated sum, which is designated a commission, these facts constitute the contractor an independent contractor, and he alone can sue a third person for the damages resulting from the negligent construction of a portion of the building under a contract made with him.

Error to a judgment of the Circuit Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The contract referred to in the opinion of the court is in the following words and figures, to wit:

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"This agreement entered into this 16th day of February, 1903, between Geo. W. Lambert, the party of the first part, and L. H. Jenkins, the party of the second part, witnesseth:

"First: The party of the first part hereby agrees to purchase all material, employ all labor, superintend, and erect, for the party of the second part, a two (2) story building, 100 x 125, at the S. W. corner of Allison and Broad Streets, in the City of Richmond, County of Henrico, State of Virginia, in keeping with certain plans in hand.

"Second: The party of the first part further agrees to purchase all material, and employ all labor, and render the said party of the second part a true and accurate account of such purchases, and pay-roll, without any profit or commission whatsoever thereon.

"Third: The said party of the first part agrees to use his best efforts to secure the material and labor at the lowest cost of production; and guarantees that the workmanship shall be first class in every respect, and satisfactory to the party of the second part; and to complete the building inside of five (5) months from this date.

"Fourth: The party of the first part estimates that the *net cost* of all material and labor necessary for the completion of the building—which includes power elevator; furnace of sufficient size to heat the building, with all necessary pipes for same; granolithic floor or its substitute—will cost the party of the second part the sum of twelve thousand, one hundred and ten dollars (\$12,110). The above amount does not include the amount to be paid the said party of the first part for his services as hereinafter set forth.

"Fifth: Should the amount be expended on the building exceed the amount here set forth, the consent of the party of the second part must be obtained.

"Second:

"First: The party of the second part agrees to pay the net

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cost of material, and labor as above, and pay on same from time to time as necessary.

“Third: The party of the second part agrees to pay the party of the first part, as the work progresses, such a portion of his commission, viz: \$1,300.00, as may be mutually agreed upon.

“Second: The party of the second part further agrees, that in addition to the net cost of material, fixtures and labor, as herein set forth, that he will pay the said party of the first part the sum of one thousand three hundred dollars (\$1,300). And should the amount (with the consent of the party of the second part) exceed the amount herein stated, the party of the second part is to pay no more to the party of the first part than the said amount, \$1,300.00.

“Witness our hands the day and year first written above.

G. W. LAMBERT.  
L. H. JENKINS.”

*Edwin M. Pilcher and L. O. Wendenburg*, for the plaintiff in error.

*Jno. G. Pollard and Christopher B. Garnett*, for the defendant in error.

WHITTLE, J., delivered the opinion of the Court.

The defendant in error, L. H. Jenkins, entered into a written agreement with a contractor, George W. Lambert, by which the latter engaged to purchase material, employ labor and superintend and erect for the former a building in the city of Richmond for a book factory, in accordance with certain plans in hand; to use his best efforts to secure material and

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labor at the lowest cost; and to render his employer a true account thereof. The estimated cost of the building was \$12,110, which amount was not to be exceeded without the consent of the owner, and Lambert guaranteed that the workmanship should be first class and satisfactory in every respect; while Jenkins agreed to pay the net cost of material and labor together with a commission of \$1,300 to Lambert.

The plans called for a granolithic floor in one of the rooms of the building, and the contractor employed Veitch to supply the material and lay the floor. The work was alleged to have been negligently done; and in an action of trespass on the case against Veitch, Jenkins recovered a verdict and judgment for \$1,500, which judgment is the subject of review.

We are of opinion that the case turns upon the character of the contractual relation between Lambert and Jenkins. If Lambert was an independent contractor, it follows that there was no such privity between his employee, Veitch, and Jenkins as would render the former answerable to the latter in damages for defective work.

In its essential facts, the case is not distinguishable from that of *Emmerson v. Fay*, 94 Va. 60 26 S. E. 386. In that case it was held that, "A person who is skilled in the performance of a particular kind of work, and who, on account of his skill is employed to do a piece of work, without restriction upon the means to be employed in doing the work, and who employs his own labor which is subject alone to his control and direction, and undertakes to do the work either according to his own ideas, or in accordance with plans furnished by the person for whom the work is done, is an independent contractor. Nor is his character as independent contractor affected by the fact that his compensation is measured by a *per diem* to himself and those employed by him, nor that the owner furnishes material for the work."

The existence and character of the relation between Jenkins



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and Lambert depending on a written contract unambiguous in its terms, it was the province of the court to construe the instrument and as a matter of law to determine the relation between the parties. *Pioneer Fireproof Con. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Rogers v. Florence R. Co.*, 31 S. C. 378, 9 S. E. 1059.

It is clear, we think, under the authorities, that Lambert was an independent contractor; and this view is conclusive of the case and renders a consideration of subordinate assignments of error unnecessary.

The verdict of the jury must be set aside, the judgment reversed, and the case remanded for a new trial to be had in accordance with this opinion.

*Reversed.*

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Opinion.

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**Wytheville.**

LYNCHBURG HOSIERY MILLS v. CHESTERFIELD  
MANUFACTURING CO.

June 13, 1907.

1. **CONTRACTS BY CORRESPONDENCE—Accession to Same Terms.**—In order to establish a contract by correspondence, there must appear upon the face of the correspondence a clear accession by both parties to one and the same set of terms. A proposal to accept, or an acceptance on terms varying from the offer, is a rejection of the offer. The acceptance must be unqualified, and no point left open for future consideration or negotiation between the parties. In the case at bar, the acceptor of the offer introduced into his acceptance new terms not contained in the offer, nor implied by law, and hence no contract was concluded between the parties.

Error to a judgment of the Hustings Court of the city of Petersburg in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*R. C. Blackford and Hamilton & Mann*, for the plaintiff in error.

*Davis & Davis*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the Court.

The controversy in this case grows out of the following correspondence by mail and telegraph between the parties:

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"June 29th, 1905.

"Chesterfield Mfg. Co.,

Gents:—Please send lowest quotations on 12s and 14s as had from you, and oblige, Yours, etc., J. G. Burton, Mgr."

"July 1st, 1905.

"Lynchburg Hosiery Mills,  
Lynchburg, Va.

"Dear Sirs:

"We have your card of the 29th ult., and in reply beg to quote you subject to acceptance by wire Monday next, No. 12 yarn at 16½c., No. 14 at 17c., less 2% cash ten days, delivered Lynchburg.

Yours truly,

"Chesterfield Mfg. Co.,

"By J. F. Taylor, Pres. & Treas."

"July 3rd, 1905.

"Chesterfield Mfg. Company,  
Kingston, N. C.

"We accept your quotation of July 1st for fifty thousand pounds, No. twelve and fourteen. See particulars by letter to-day.

"Lynchburg Hosiery Mills."

"July 3rd, 1905.

"Chesterfield Mfg. Co.

"Gentlemen:—

"Your favor of July 1st to hand. In reply beg to say we wired you as follows:

"Will accept your quotation for (50,000 lbs.) fifty thousand pounds of 12s and 14s. Particulars by letter to-day."

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"We want you to deliver 1200 lbs. of 14s and 800 lbs. of 12s per week, commencing 2 or 3 weeks from date for 10 weeks. Will furnish you with proportions for balance not less than four weeks ahead of time for delivery. Should you need definite instructions for balance of order sooner than this, let us know and we will furnish them to you. We want the 50,000 lbs. in 12s and 14s on cones same grade, size and all details as before.

"Please send acceptance of contract per return and oblige,

"Yours truly,

"Lynchburg Hosiery Mills,

"J. G. Burton, Mgr."

"July 4th, 1905.

"Lynchburg Hosiery Co.,

"Lynchburg, Va.

"Dear Sirs:

"We received your wire last night saying you accepted our quotation for 50,000 pounds 12s and 14s yarn, and see particularly by letter. We are replying this morning as follows: 'Your wire last night received, your order too large, shall we book you for usual quantities you have been buying?' and now confirm.

"Your orders placed with us heretofore have been for 3,000 to 10,000 pounds and in quoting you on 1st inst., we of course presumed that if you placed your order it would be for the usual quantity. Nothing was said in your card about wanting a large quantity, and the natural presumption on our part was that you were in the market for usual quantity.

"The cotton market advanced materially yesterday, and we cannot book your order for 50,000 pounds at price quoted, but, as we wired you, are willing to protect you for your usual purchase of 4,000 to 10,000 pounds.

"We would also like to call your attention to the terms

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quoted you, viz: 2% ten days. We mention this, as some of your last bills have run considerably over this, and as we have no capital to carry accounts with, must ask that payments be made promptly in accordance with terms.

"Yours truly,

"Chesterfield Mfg. Co.

"By J. F. Taylor, Pres. & Treas."

After some further correspondence between the parties the plaintiff in error instituted this action to recover damages for the breach of the agreement which it was alleged the correspondence between the parties established.

Upon the trial of the cause the plaintiffs introduced the correspondence quoted and some other evidence as to the dealings between the parties and the usages of the trade. The defendant introduced no testimony, but demurred to the plaintiff's evidence. Upon that demurrer the trial court was of opinion that the law was for the defendant and gave judgment accordingly. To that judgment this writ of error was awarded.

The only question involved in the case is whether or not the correspondence quoted established a contract between the parties for the sale and purchase of fifty thousand pounds of yarn.

The evidence introduced showed the circumstances surrounding the parties when the correspondence took place. They had been dealing with each other during a part of the year 1904 and the early part of the year 1905. During that time the plaintiffs had purchased from the defendant thirty or thirty-five thousand pounds of yarn in eight or nine different orders of the same numbers, but no one of the orders had exceeded ten thousand pounds, and the yarn had been furnished in such quantities and at such times as the parties had expressly or impliedly agreed upon or assented to.

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It was held by this court in the case of *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888, that in order to establish a contract by correspondence there must appear upon the face of the correspondence a clear accession by both parties to one and the same set of terms. A proposal to accept or an acceptance on terms varying from the offer is a rejection of the offer. The acceptance must be unqualified and no point left open for future consideration or negotiation between the parties.

Tested by this rule it is clear that the correspondence in this case does not establish a contract. In the defendant's letter of July 3, the quantity of yarn proposed to be sold is not fixed, nor the time for its delivery. But if it be conceded, as the plaintiff's counsel argues, that the law would imply that the delivery was to be within a reasonable time and that since the defendant had not fixed the quantity of yarn which it was willing to sell upon the terms named, the law gave the plaintiffs the right in accepting the offer to fix the quantity at any reasonable quantity, and that fifty thousand pounds was not unreasonable, the plaintiff's telegram and letter of July 3 are not an unconditional acceptance of the defendant's offer. In their letter the plaintiffs tell the defendant they wish him to deliver 1200 lbs. of No. 14 and 800 lbs. of No. 12 per week, commencing in two or three weeks from date and such delivery to continue for ten weeks; that they will furnish the defendant with the proportions for balance of yarn not less than four weeks ahead of time for delivery; and that if it needed definite instructions for balance of order sooner than this to let them know and they would furnish them.

There was nothing in the defendant's offer which required it to furnish more pounds of yarn of one number than of the other, nor to commence the delivery in two or three weeks and continue it for ten weeks, and then to await the plaintiff's pleasure as to the time and the proportions in which the residue of the

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yarn was to be furnished. These were new terms which the plaintiffs had introduced into their acceptance not contained in the defendant's offer nor implied by law. The plaintiffs seem at that time to have recognized this for they ask the defendant to send acceptance of contract by return mail, which would have been wholly unnecessary if their acceptance had been an unconditional acceptance of the defendant's offer.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

*Affirmed.*

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**Wytheville.**

JORDAN v. UNIVERSALIST GENERAL CONVENTION TRUSTEES.

June 13, 1907.

1. INDEFINITE CHARITIES—*Devise to a Corporation for Corporate Purposes.*—While the courts of chancery of this State will not undertake to enforce indefinite charities, a devise to a corporation for the general purposes of its incorporation cannot be said to be uncertain in any respect, and will be upheld. It is immaterial that the corporation was created by another State, and that its object is to hold property for church purposes.

Appeal from a decree of the Circuit Court of the city of Norfolk. Decree for defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*S. M. Brandt*, for the appellant.

*T. S. Purdie*, for the appellee.

KEITH, P., delivered the opinion of the Court.

Thaddeus Jordan, the appellant, filed his bill in the Circuit Court of the city of Norfolk, in which he states that he is the heir at law and next of kin of Joseph Jordan, deceased, who by his last will and testament gave to his wife, Mary Elizabeth Jordan, and his son, Richard Silvester Jordan, "my dwelling



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house and lot in Huntersville (in the county of Norfolk), on North Street, called Lot No. 20, in the following manner, that is to say: Should my said son survive my said wife, to him for his life; should my said wife survive my said son, to her for her lifetime; while they both live to own the same equally; at the death of both the said house and lot to go to the Trustees of the Universalist General Convention, and by them to be sold and the money applied to mission work in the United States of America."

It appears that both Mary Elizabeth Jordan and Richard Silvester Jordan are dead, dying intestate and without issue; that the plaintiff is the son of Joseph Jordan, the testator, by a former marriage; that he has no brothers or sisters nor the descendants of any living; and that he is the sole heir at law and distributee. The bill avers that the Universalist General Convention is an unincorporated religious society, composed of the various branches of the Universalist Church throughout the United States; that plaintiff has used due diligence to ascertain who the representatives or trustees of the Universalist General Convention are, and he further alleges that the Universalist General Convention cannot take title to real estate in the State of Virginia; that the remainder after the life tenancy of Mary Elizabeth Jordan to the Universalist General Convention, or the representatives or trustees thereof, is null and void; that the devise of the property intended to be disposed of by the first clause of the will is so indefinite that its meaning and effect cannot be determined without the aid of a court of equity; and, therefore, he prays that the trustees of the said Universalist General Convention, and all other unknown persons who are or may be interested in the real estate attempted to be devised by the first clause of the will, may be made parties defendant to the bill by the general description of parties unknown.

From the answer and exhibits filed by the trustees of the Universalist General Convention, it appears that the Univer-

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salist General Convention is a corporation duly incorporated and organized under the laws of the State of New York, as appears by an Act of the Legislature of that State passed March 9, 1866, and this is agreed to be a fact. It is also agreed that the persons who in the answer style themselves as the trustees of the said corporation, are its duly elected and qualified trustees.

Upon the pleadings and proof, the Circuit Court was of opinion "that the said corporation is not prohibited by the laws of the State of Virginia, or by public policy, from taking and selling the property so devised to it and using the proceeds of its sale, for the purposes specified in said devise; and that the said devise in the first clause of the will of the said Joseph Jordan is a valid disposition of the property named therein to the aforesaid corporation, the Universalist General Convention, subject to the life estate of the aforesaid wife and son of the testator," and from that decree Thaddeus Jordan obtained an appeal from one of the judges of this court.

The contention of appellant is that the disposition of real estate must be made in accordance with the laws of the place in which it is situated, and that a devise of land to a corporation for the uses declared in the clause of the will under consideration is contrary to the public policy of this State, and therefore null and void.

In *Gallego's Ex'ors. v. Attorney General*, 3 Leigh, 450, 24 Am. Dec. 650, the court held that the English statute of charitable uses of 43 Eliz. having been repealed in Virginia, "the courts of chancery have no jurisdiction to decree charities, where the objects are indefinite and uncertain." It was accordingly held that a bequest of \$2,000 to be distributed among needy, poor and respectable widows, and the devise of a lot to trustees in fee, upon trust to permit all and every person belonging to the Roman Catholic Church, as members thereof, or professing that religion, and residing in Richmond at the

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*time of his death*, to build a church on the lot, for the use of *themselves and of all others of that religion who may hereafter reside in Richmond*, were void for uncertainty as to the beneficiaries.

In *Seaburn v. Seaburn*, 15 Gratt. 423, it was held that the devises and bequests contained in the will then under consideration would undoubtedly be void for uncertainty, according to the principle of *Gallego's Ex'ors. v. Attorney General*; but in that case counsel contended that the devises and bequests were rendered valid under Ch. 77, sec. 8, p. 362, of the Code (1849) then in force, which provided that "Every conveyance, devise or dedication shall be valid which since the 1st day of January, 1777, has been made, and every conveyance shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation as a place for public worship or as a burial place or a residence for a minister; and the land shall be held for such use or benefit and for such purpose and not otherwise." It was held, however, that the case was controlled by the decisions applicable to indefinite charities, and was not validated by the statute, because the word "conveyance" as therein used did not embrace a devise.

In *Roy v. Rowzie*, 25 Gratt. 599, it was held that where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given them in the will, or where there are two or more objects or subjects which answer equally the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and if such intention is so ascertained with sufficient certainty the bequest is valid. In that case a bequest to "the Baptist Theological Seminary in South Carolina," was held, upon the evidence, to have been intended to be a bequest to the "Southern Baptist Theological Seminary," a Baptist theological institution in South Carolina, incorporated by an act of that State.

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In the course of the opinion the court said: "There can be no doubt but that generally a testator, domiciled in this State, may, by his will, duly executed and admitted to probate, according to the laws of this State, make a valid bequest to a corporation chartered by another State, and authorized by its charter to take and hold property.

"The Southern Baptist Theological Seminary is a corporation chartered by the State of South Carolina, and authorized by its charter to take and hold property; and the bequest in question was made to it by a testatrix domiciled in this State, by her will duly executed and admitted to probate according to the law of this State. Why then is not the said bequest valid?

"Certainly it is competent for the legislature of this State to prohibit altogether a bequest to a corporation of another State, and *a fortiori* to prohibit such a bequest in a particular or special case. There has been no such prohibition generally, or altogether. Has there been any particular or special prohibition which applies to the case under consideration? The appellees contend that there has been, while the appellants contend for the contrary; and this is the main subject of controversy in this case.

"The appellees contend that our law prohibits any bequest to a theological seminary, whether it be in or out of the State, while the appellants contend that our law does not prohibit a bequest to an incorporated theological seminary, authorized by its charter to take and hold property, whether such corporation be in or out of the State.

"The law on which the appellees rely is contained in the Code (of 1873), ch. 77, sec. 2, which declares that 'every gift, grant, devise or bequest which, since the second day of April in the year one thousand eight hundred and thirty-nine, has been, or at any time hereafter shall be, made for literary purposes, or for the education of white persons within this State (other

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than for the use of a theological seminary);' and similar words are then used in regard to the education of colored persons within this State, after which the law proceeds: 'whether made in either case to a body corporate or unincorporated, or a natural person, shall be as valid as if made to or for the benefit of a certain natural person,' &c.

"Certainly this is the only law of this State which can have the effect, if any can, of invalidating the bequest in question. Can this law have that effect?

"It has always been settled as a general rule, that a devise or bequest, indefinite as to its object or purposes, was on that account void. In England the subject of charities has long if not always formed an exception to that rule; either at common law or in virtue of the statute of 43 Eliz., commonly called the statute of charitable uses. But ever since the decision of the cases of the *Baptist Association v. Hart's Ex'ors*, 4 Wheat. 1. 1 L. Ed. 499, by the Supreme Court of the United States, and *Gallego's Ex'ors. v. The Attorney General*, 3 Leigh 450, 24 Am. Dec. 650, by this court, it has been considered to be well settled that the English law of charities does not exist in this State, and that with the exception thereafter made by statute, which will be presently noticed, 'charitable bequests,' in the language of Judge Carr, in the latter case, 'stand on the same footing with us as all others, and will alike be sustained by courts of equity.'"

The result of that inquiry was to hold that the bequest was valid.

It will be observed that in this case the bequest is to the trustees of the Universalist General Convention of the remainder in certain real estate, which is to be by them sold and the money applied to mission work in the United States of America.

In *Protestant Episcopal Education Society of Virginia v. Churchman*, 80 Va. 718, a bequest to be used exclusively for

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"educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established," was held not to be void for uncertainty, and *Gallego's Ex'ors v. Attorney General, supra*, was disapproved.

A like result was reached in *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321; and in *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745, the whole subject was reviewed, the doctrine of *Gallego's Ex'ors v. Attorney General* re-affirmed, and the *dicta* disapproving that decision which appear in the opinions in 80 and 86 Va., above cited, were in terms disapproved, though the correctness of the decision in each of those cases was not questioned. While the provisions of the will in *Fifield v. Van Wyck, supra*, were held to be too indefinite to be enforced by a court of equity, there is no intimation or suggestion that a devise to a corporation for purposes within the scope of its powers and duty would be held void. That case merely maintains that the doctrine asserted in *Gallego's Ex'ors v. Attorney General*, is the law of this State, except and until it is or shall be modified by the legislature; and that our courts of chancery will not undertake to enforce indefinite charities.

In the still more recent case of *Jordan's Admx. v. Richmond Home for Ladies*, 106 Va. 710, 56 S. E. 730, the whole subject was elaborately reviewed, both as to the decisions and the statute law in force in this State, and the conclusion reached that a bequest to a corporation for the general purposes of its incorporation was not uncertain in any respect.

We are of opinion that there is no error in the decree of the Circuit Court, which is affirmed.

*Affirmed.*

## Syllabus.

**Wytheville.**

## LYNCHBURG TRACTION &amp; LIGHT CO. v. GUILL.

June 13, 1907.

1. NEGLIGENCE—*How Charged—Declaration.*—Negligence, as a general rule, is a conclusion of law from facts sufficiently pleaded, and the office of a declaration is to inform the defendant of the case which he has to meet, so that he may have a reasonable opportunity to prepare and make his defense. It is not enough to say that the plaintiff was injured, and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied on to establish the negligence of the defendant, for which he is to be held liable, should be stated with reasonable certainty. The declaration should state sufficient facts to enable the court to say, on demurrer, whether, if the facts stated are proved, the plaintiff is entitled to recover. More general averments of negligence are not sufficient.
2. DEDICATION—*Acceptance—City Streets—Roads.*—The intention to dedicate a street in a city, or a road in the country, may be shown in any way by which intention may be manifested. The acceptance of the dedication may, in the case of streets, be shown by the acts of corporation officers, but the acceptance of a road, in order to impose upon the public the duty of keeping it in order, must appear as a matter of record, though a formal acceptance is not necessary. It is sufficient if the record of the proper tribunal shows other acts whereby the road is claimed as a public one.
3. HIGHWAYS—*Evidence—Burden of Proof—Street Railways.*—In an action to recover damages from a street car company for an injury negligently inflicted on a traveller on an alleged public highway, the burden is on the plaintiff to show that the *locus in quo* was a public highway.
4. TRIAL—*Argument of Counsel—Doubtful Suggestions.*—It is far better for counsel to content themselves with asking a verdict of the jury based upon the law and the evidence, without suggestions of a nature which might imperil an otherwise righteous judgment.

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Error to a judgment of the Circuit Court of the city of Lynchburg in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The declaration in this case is in the following words and figures, to-wit:

"Virginia,

"In the Circuit Court for the County of Campbell.

Second February Rules, 1906.

"John Dudley Guill, who sues by John Davis Guill, his father and next friend, complains of the Lynchburg Traction & Light Company, a corporation, of a plea of trespass on the case for this, to-wit: That heretofore, to-wit: On or about the 21st day of November, 1905, the said defendant was the owner and operator of a certain street railroad, lying and being in part within the said County of Campbell, and along one of the public streets, roads and highways of said county, and between said city and the place known as Virginia Christian College, near to the City of Lynchburg, which said street railroad was operated by means of electricity, and that whilst operating the same the said defendant so carelessly, recklessly, negligently and improperly managed its cars that by reason of its carelessness and negligence one of its cars ran and struck with great force upon and against the plaintiff, who was then and there upon said street, road or highway, whereby his left arm was greatly broken, bruised, cut, fractured, crushed, wrenched and mangled, so that the said arm had to be amputated above the elbow. And the plaintiff was otherwise greatly cut, bruised, maimed and lamed, and thereby became and was sick, sore, lame and disordered, and so continued for a long



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time, to-wit, hitherto, during all of which time he suffered great bodily pain and mental anguish; was prevented from transacting his ordinary affairs and business, and lost large gains and profits thereby, and especially by the loss of his said arm, his means of making and earning a living were and are greatly impaired, and his injuries are permanent and lasting; and so that by reason of the premises he was obliged to lay out and expend a large sum of money, to-wit, the sum of \$500.00, in and about endeavoring to be cured of his said injuries, and further he is greatly and permanently injured, maimed and disfigured, all of which was caused wholly and entirely by and through the carelessness and negligence of the said defendant as above set forth.

"And for this, also, to-wit: That heretofore, to-wit, on the 21st day of November, 1905, in the said County of Campbell, and in the night time of that day, the said plaintiff was then and there a passenger upon one of the cars on the street railroad, which was owned and operated in its capacity as a common carrier of passengers by the said defendant, and thereby it became and was the duty of the said defendant to care for the protection of the plaintiff and to prevent him from being injured, as far as human care and foresight could go, and the plaintiff, a young man about nineteen years of age, was then and there helplessly intoxicated and unable to take care of himself, or understand the dangers to which he might be exposed, a fact which the defendant, through its agents and servants in charge of said car well knew, or in the exercise of due care ought to have known, and therefore ought reasonably to have anticipated that if the plaintiff was put off of said car and abandoned in the proximity of its tracks he would, in the absence of due precautions on the part of said defendant, be more likely to be injured. And the plaintiff avers that notwithstanding the foregoing, the said defendant wrongfully, negligently, recklessly and wantonly ejected and put off and from, and caused the said plaintiff to get off and from the said car, and

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abandoned and left him at a time and place where it knew, or by the exercise of due care ought to have known, a person in his condition would necessarily be exposed to great danger of bodily injury from the cars passing along and upon the track of the defendant, it being in the night time and very dark, and the place being at or near a certain switch of the defendant, where its cars frequently passed each other going in different directions, and wrongfully, negligently, recklessly and inhumanly failed to take any sufficient precaution whatever to prevent injury to said plaintiff, but left and abandoned him in his helpless and intoxicated condition in the close proximity of the track and switch aforesaid, so that, as might reasonably have been anticipated, the plaintiff fell or lay down beside and upon the roadbed, ties, rails and tracks of the defendant and being unable from his intoxication to appreciate or know the danger to which he was thus exposed, was run upon and against with great force and was struck by one of the cars of the defendant, whereby his left arm was greatly broken, bruised, cut, fractured, crushed, wrenched and mangled, so that the said arm had to be amputated above the elbow. And the plaintiff was otherwise greatly cut, bruised, maimed and lamed, and thereby became and was sick, sore, lame and disordered, and so continued for a long time, to-wit, hitherto, during all of which time he suffered great bodily pain and mental anguish; was prevented from transacting his ordinary affairs and business, and lost large gains and profits thereby, and especially by the loss of his said arm his means of making and earning a living were and are greatly impaired, and his injuries are permanent and lasting; and so that by reason of the premises he was obliged to lay out and expend a large sum of money, to-wit, the sum of \$500.00, in and about endeavoring to be cured of his said injuries, and further he is greatly and permanently injured, maimed and disfigured, all of which was caused wholly and entirely by and through the carelessness and negligence of the said defendant, as above set forth."

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"And for this also, to-wit: That heretofore, to-wit, on the 21st day of November, 1905, within the said county of Campbell, the said plaintiff was a passenger on one of the street cars of said defendant, which was operated by electricity upon certain tracks or rails of the defendant, who is a common carrier, and while the plaintiff was helplessly intoxicated and unable to take care of himself the said defendant expelled, put off, and caused the plaintiff to get off and leave its said car, and negligently, wantonly, recklessly and inhumanly abandoned the plaintiff in the darkness of night and in close proximity to its tracks, where it knew, or by the exercise of due care ought to have known, that the plaintiff would necessarily, in his condition, be exposed to great danger of bodily injury, and the plaintiff as might have been expected, having fallen or lain upon the rails, track, or roadbed of the defendant, he was carelessly, negligently, recklessly and wantonly run upon and against and struck by one of the cars upon said track or rails, which said car was being operated in a careless, negligent manner, and the plaintiff was struck with such force and violence by said car that his left arm was greatly broken, bruised, cut, fractured, crushed, wrenched, and mangled, so that the said arm had to be amputated above the elbow. And the plaintiff was greatly cut, bruised, maimed and lamed, and thereby became and was sick, sore, lame and disordered, and so continued for a long time, to-wit, hitherto, during all of which time he suffered great bodily pain and mental anguish; was prevented from the transaction of his ordinary affairs and business, and lost large gains and profits thereby, and especially by the loss of his said arm, his means of making and earning a living were and are greatly impaired, and his injuries are permanent and lasting; and so that by reason of the premises he was obliged to lay out and expend a large sum of money, to-wit, the sum of \$500.00, in and about endeavoring to be cured of his said injuries, and further he is greatly and per-

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manently injured, maimed and disfigured, all of which was caused wholly and entirely by and through the carelessness and negligence of the said defendant, as above set forth.

"And the plaintiff avers that by the exercise of due care on the part of the defendant said accident could have been averted and prevented even after he had fallen and lain upon the roadbed, track or rail, by reason of the fact that the defendant's servant in charge of the running of the car which struck the plaintiff either saw the plaintiff upon said roadbed, track or rail, or by the exercise of due care on the part of the defendant could have seen him in time to stop said car before striking the plaintiff.

"To the damage of the said plaintiff \$15,000.00. And, therefore, he brings his suit."

Additional Count to Declaration.

"And for this, also, to-wit: That heretofore, to-wit, on or about the 21st day of November, 1905, the said defendant was the owner and operator of a certain street railroad, lying and being in part within the said County of Campbell, and along a certain road, street, or highway, which was in general use by the public as such road, street and highway, near to the city of Lynchburg, where the said defendant knew large numbers of persons passed along and upon the track of the said street railroad at all times of day and night, and where said defendant knew that persons often were upon *the* said track at that point, and that the said defendant was operating cars upon said track by means of electricity, and thereupon, it became and was the duty of the said defendant in operating said cars to exercise due and ordinary care in keeping a lookout, so as to prevent injury to persons and especially the plaintiff, whom it knew, or in the exercise of ordinary care ought to have known, were and might be upon its said track and railroad at that point, and it also became and was the duty of the said

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defendant to exercise due and ordinary care in running its cars at such reasonable and proper rates of speed as would enable it to stop said car upon discovering a person, and especially the plaintiff, on the track at that point before striking him, and it also became and was the duty of the said defendant to use ordinary care to provide and equip its said cars with proper lights, brakes and other appliances in order to enable its servants in charge of said cars to stop the same in time to prevent running said car upon a person, and especially the plaintiff, who was and might be on the track at that point, but the said defendant not regarding its said duties, or any of them, negligently, wilfully, recklessly, and wrongfully failed to use ordinary care to provide one of its said cars with proper lights, brakes and other appliances, and failed to use ordinary care to run the same at such proper rates of speed, and failed to use ordinary care to keep a proper lookout upon its track aforesaid, so that because and by means of the negligence of the defendant in the aforesaid particulars, and by the reckless, careless, negligent and improper management of its car aforesaid, the said defendant then and there ran its said car upon and against the plaintiff, who was then and there in and upon the said street, road, and highway, and struck upon him with great force and violence, with said car, so that his left arm was greatly broken, bruised, cut, fractured, crushed, wrenched and mangled, and had to be amputated above the elbow, and the plaintiff was otherwise greatly cut, bruised, maimed and lamed, and by means of his said injuries became and was sick, sore, lame and disordered, and so continued for a long time, to-wit, hitherto, during all of which time he suffered great bodily pain and mental anguish; was prevented from transacting his ordinary affairs and business; and lost large gains and profits thereby, especially by the loss of his said arm, his means of making a living were and are greatly impaired, and his injuries are permanent and lasting, and so that by reason of his said injuries

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he was obliged to lay out and expend, and did lay out and expend, a large sum of money, to-wit, the sum of \$500.00, in and about endeavoring to be cured of the said injuries, and furthermore he is greatly and permanently injured, maimed, disfigured and disabled, all of which was caused wholly and entirely by and through the carelessness and negligence of the defendant, as above set forth.

"To the damage of the said plaintiff \$15,000.00. And therefore he brings his suit."

*Horsley & Kemp*, for the plaintiff in error.

*Don P. Halsey*, for the defendant in error. ,

KETCH, P., delivered the opinion of the Court.

This action was instituted in the Circuit Court of Campbell county by Guill, by his father and next friend, against the Lynchburg Traction and Light Company, to recover damages for an injury.

The declaration contains four counts, and there was a demurrer to it and to each count thereof, which the Circuit Court overruled, and a judgment was rendered upon the verdict of a jury in favor of the plaintiff for the sum of \$5,000; and the case is before us for review of certain rulings made during the progress of the trial.

It is unnecessary to consider the second and third counts of the declaration, as the Circuit Court instructed the jury that there could be no recovery upon them.

The first error assigned is to the judgment of the court overruling the demurrer to the first count of the declaration.

It states that the defendant was the owner and operator of a certain railroad, lying in part within the county of Campbell, and along one of the public streets, roads and highways of said

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county; that the railroad was being operated by means of electricity, and that the defendant so carelessly, recklessly, negligently and improperly managed its cars that by reason of its carelessness and negligence one of them ran and struck with great force upon and against the plaintiff, who was then upon said highway, whereby his left arm was greatly bruised, broken and mangled, so that it became necessary to amputate it above the elbow.

If, as averred in the declaration, the plaintiff was upon a public highway, his right upon it was equal to that of the railroad company, and it was bound to use the degree of care proper to that situation, and if it failed to do so and as a result of its negligence the injury was inflicted upon the plaintiff, a case for the recovery of damages was made out. But negligence is a conclusion of law from facts sufficiently pleaded. The office of a declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare and make its defense. It is not enough to say that the plaintiff was injured and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied upon to establish the negligence for which the defendant is to be held liable must be stated with reasonable certainty.

In *Hortenstein v. Va.-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996, this court, after a full review of the authorities, disapproved the case of *B. & O. R. Co. v. Sherman's Admr.*, 30 Gratt. 602, and approved what was said in *B. & O. R. Co. v. Whittington's Admr.*, 30 Gratt. 805, stating the law to be that "in an action of tort founded on the negligence of the defendant, the declaration must allege what duty was owing by the defendant to the plaintiff, the failure to discharge which caused the injury complained of, and its breach, or make such averments of facts as will show the existence of the duty and its breach. These averments must be made directly and positively and not merely by way of recital." That "The object of

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a declaration is to apprise the adverse party of the ground of complaint, and, in actions of tort, the declaration must state sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff is entitled to recover. A statement of a cause of action in general terms, and general averments of negligence of the defendant which fall short of this are not sufficient."

In *Southern Ry. Co. v. Hansbrough*, 105 Va. 527, 54 S. E. 17, the court held it to be insufficient upon demurrer, because, while it alleged that the defendant's employees carelessly, negligently, and unskillfully, with great rapidity and with great force and violence, ran one of its engines upon and against the plaintiff, thereby inflicting the injury complained of, it did not point out in what manner the defendant was negligent, nor what duty was owing from the defendant to the plaintiff, the breach of which was the cause of the alleged injury. The declaration in that case was less open to criticism, indeed, than that under consideration, for in that case it appears that the injury occurred upon the street of a city over which the train that inflicted the injury was being run at a high rate of speed; but it was considered that the mere rate of speed was not in itself *per se* negligence, there being no averment in that count that there was any ordinance regulating the speed of trains.

The principle announced in *Hortenstein's Case*, *supra*, was approved in *Lane Bros. v. Seakford*, 106 Va. 93, 55 S. E. 556, and *Hot Springs Lumber Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580; *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *N. & W. Ry. Co. v. Stegall's Admx.*, 105 Va. 538, 54 S. E. 19.

*Blue Ridge Light & Power Co. v. Tutwiler*, 106 Va. 54, 55 S. E. 539, considered by itself apart from decisions which show that the court had no purpose in that case to depart from the principle of the *Hortenstein case*, *supra*, or to impair or diminish its authority, might appear somewhat to relax the



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rule. The facts in that case constituting negligence do not, it may be conceded, sufficiently appear, but there was no intention upon the part of the learned judge who wrote that opinion, nor of those who approved it, to change or limit the rule announced in the *Hortenstein* case. The conclusion reached in *Blue Ridge Light & Power Co. v. Tutwiler*, in favor of the plaintiff in error, was upon the merits of the case so plainly right that the demurrer, for that reason, may not have been scrutinized with the same caution that would have been exercised had the decision of the case ultimately rested upon the demurrer.

We are of opinion that the demurrer to the first count of the declaration should have been sustained.

The case of the defendant in error depends largely upon his contention that at the time of the injury he was upon a public highway. The accident occurred in the county of Campbell, just outside the limits of the city of Lynchburg; and, therefore, in determining whether or not it was a public highway, the law is to be ascertained with respect, not to the dedication and opening of streets in a city, but to the establishment of public roads in the country.

In *Kelly's Case*, 8 Gratt. 632, decided by the General Court, at its December term, 1851, it was held, that "the mere use of a road by the public, for however long a time, will not constitute it a public road. A mere permission to the public, by the owner of land, to pass over a road upon it, is, without more, to be regarded as a license, and revocable at the pleasure of the owner. A road dedicated to the public must be accepted by the county court upon its records before it can be a public road. If a county court lays off a road before used, into precincts, or appoints an overseer or surveyor for it, thereby claiming the road as a public road, and if after notice of such claim the owner of the soil permits the road to be passed over for any long time, the road may be well inferred to be a public road." That case

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has been frequently followed, and its authority never questioned. In *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738, it was approved by a unanimous court.

In the very recent case of *Town of West Point v. Bland*, 106 Va. 792, 56 S. E. 802, speaking with reference to the dedication of land, the court said: "There must be an intention to appropriate it to the use of the public, and the acts of the owner must be unmistakable in purpose and decisive in character; not necessarily by deed, or in writing, yet effectually and validly made by acts or declarations. It may be express or implied, and in any conceivable way by which the intention can be manifested; but in whatever way, it must be unequivocally and satisfactorily made. Parting with ownership is not to be presumed, and while in case of highways and streets a dedication may be shown by acts and declarations, they must be of such public and deliberate character as to make them generally known, and not of doubtful intention."

In *Terry v. McClung*, 104 Va. 599, 52 S. E. 355, the law is said to be well settled, that "the mere user of a road by the public, for however long a time, will not constitute a public road; that a mere permission to the public by the owner of land to pass over a road upon it is, without more, to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the county court upon its records before it can be a public road."

The intention to dedicate a street in a city, or a road in the country, may be proved in any conceivable way by which the intention can be manifested; but in whatever way, it must be unequivocally and satisfactorily made. With respect to the streets of a city, the acceptance may be shown by the "acts of the corporation officers, which may have the same effect as the acts of the county courts." *Kelly's Case, supra*.

Defendant in error, upon this point, relies upon the case of *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830. The court

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there was dealing with a street in the city of Danville, and quotes from *Harris' Case*, 20 Gratt. 833, where the court was dealing with the law applicable to streets in the city of Norfolk. What is said in *Buntin v. Danville*, upon the subject of the intention to dedicate, is in harmony with *Town of West Point v. Bland*, *supra*, but there are expressions in the opinion from which it might seem that the court had for the moment lost sight of the distinction made in the law between the opening of a street in a city and a highway in the country. The opinion, however, read as a whole, is not open to this criticism, for at page 205 it is said: "The road referred to had been dedicated by the owner of the soil to the public, and was used by it before he sold any of the parcels of land constituting lot N. 118; and in the conveyance to James M. Williams, Sr., the original grantee under whom the plaintiffs claim, of the parcel situate on the road, W. I. Lewis, the grantor, expressly reserved the road from the operation of the conveyance. The road was also accepted, as we have seen, by the court of the county as one of its highways. Its dedication was complete, effectual and valid."

This statement of the law is in harmony with the opinion in *Town of West Point v. Bland*, *supra*. In that case it was contended by the Town of West Point, that the road in controversy had been dedicated to the county of King William and accepted by it as a public road before the Town of West Point was incorporated, and in respect to that contention the opinion says: "There is no record evidence of the establishment of any public highway over the land in controversy, or of the working of the same as such; and while there is some evidence that boats took on and put off goods and passengers at or near where E Street, if extended, would reach the river, prior and subsequent to the incorporation of the town, there is no evidence that there was a public road located upon the land in controversy or worked as such, or that there ever was

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a well defined way over it. . . . It is clear, we think, that the town fails to show that prior to its incorporation the land in controversy had been dedicated by the owners or accepted by the county authorities as a public road." In the second place it was contended by the town that, even if this be so, after its incorporation the land in controversy was dedicated by its owner as a street and accepted as such by the town. With respect to this contention, the court says: "We are of opinion that the acts relied on in this case to show an intent to dedicate are not unmistakable in their purpose and decisive in their character, and do not establish such intent with that degree of certainty and clearness required in such cases. This being so, it is unnecessary to consider the question, whether or not the acts relied on as an acceptance by the town would have been sufficient to have shown an acceptance had it been in fact dedicated."

With respect, therefore, both to streets in cities and roads in the country, the intention to dedicate may be shown in any way by which intention can be manifested. The acceptance of the dedication may, in the case of streets, be shown by the acts of corporation officers, but the acceptance of a road, in order to impose upon the public the burden of keeping it in order, must appear as matter of record, though a formal acceptance is not necessary, and the law will be satisfied if it shall appear that the county court had laid off a road before used into precincts, or appointed an overseer or surveyor for it, thereby claiming the road as a public one.

From what we have said it follows, that we do not concur with the Circuit Court as to the manner in which a county road may be established, and there will be no difficulty in conforming its action in a future trial to the views here expressed, and therefore we refrain from passing specifically upon the exceptions to the admissibility of evidence. The evidence was in a large degree, indeed, relevant and proper upon the proof as to

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an intention to dedicate, and the error may be said to have consisted in the conclusion of law, that it was sufficient to prove the road in question to be a public highway, which is the result of dedication and acceptance, as hereinbefore stated.

There is an exception taken to an observation made by counsel for defendant in error in the argument of the case before the jury, "that they should be liberal in their verdict in favor of plaintiff, because if they found a small verdict the court could not increase the amount, but if they found a large verdict the court could reduce it to what the court thought was a proper amount."

As the case has to go back for another trial, we will merely observe, that it would be far better if counsel would content themselves with asking a verdict at the hands of the jury based upon the law and the evidence, without suggestions which might serve to put in peril an otherwise righteous judgment.

There are other exceptions to the giving of certain instructions and to the refusal of others, which we shall not now consider, because both the pleadings and the evidence upon another trial will present a different case to that now before us.

We are of opinion that the judgment of the Circuit Court should be reversed, and that the case be remanded for a new trial in accordance with this opinion.

*Reversed.*

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Syllabus.

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**Wytheville.****AUSTIN v. MINOR.**

June 13, 1907.

Absent, Cardwell, J.

1. **QUIETING TITLE—*Jurisdiction in Equity and at Law—Case in Judgment.***—Courts of equity have jurisdiction to remove clouds from the title to land where the complainant has complete title and is in possession, but where the owner holds the legal title, without actual possession, and another, who has not actual possession, asserts an adverse claim to the land, the proper remedy is an action of ejectment, and equity has no jurisdiction. In the case in judgment, neither upon the issue of title nor of possession has a case been made out which justifies the interposition of a court of equity.
2. **QUIETING TITLE—*Evidence—Plat and Endorsements.***—In a suit to quiet title, although the deeds under which the complainant claims title do not in terms embrace the land in dispute nor bring the lands embraced within their boundaries into physical connection with the land in dispute, still an old plat with endorsements thereon, tending to show that the land in dispute is the land of complainant, is admissible in evidence as a circumstance to be considered in determining the boundaries and title, but does not, in itself, constitute title.
3. **ADVERSE POSSESSION—*Marsh Lands—Case in Judgment.***—If the marsh lands in controversy in this case are capable of such enjoyment as, accompanied by a claim or color of title, would ripen into a good title, there has been no such use and occupation of them by any one as is necessary to constitute adverse possession, which must, to constitute good title, be open, notorious, exclusive, continuous and adverse.
4. **ADVERSE POSSESSION—*Lands Subject to Ebb and Flow of Tide.***—It is doubtful if title by adverse possession can be acquired of land over which the tide ebbs and flows, separate and distinct from the rights

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of the riparian owner. In the case of wild land, it is held that, in order to acquire title by adverse possession, there must be some change in their physical condition as a visible evidence of occupation and ownership, and it would seem that the same rule should apply to land under water, subject to the ebb and flow of the tide.

Appeal from a decree of the Circuit Court of the city of Williamsburg and James City county. Decree for the complainant. Defendant appeals.

*Reversed.*

The opinion states the case.

*William L. Royal and Geo. J. Hooper*, for the appellant.

*Armistead & Son and Samuel A. Anderson*, for the appellee.

KEITH, P., delivered the opinion of the Court.

Roselia A. Minor filed her bill in the Circuit Court of the city of Williamsburg and county of James City, in which she avers that she owns and occupies a certain tract of land in James City county, known as "Bush Neck" or "Sunken Ground," lying on Bush Neck Creek. She deduces her title from John W. Minor, who by deed of the 16th of November, 1903, conveyed to her 189 $\frac{3}{8}$  acres of land, 89 $\frac{3}{8}$  acres of which is bounded as follows: "On the north by the land of John W. Minor, and on the southeast by lands of John R. Austin, known as Indian Field, and on the west by Bush Neck Creek." The remaining part (100 acres) of the above-mentioned piece of land, is bounded as follows: "Commencing at a white oak on edge of marsh, thence a southwest course along edge of marsh to Bush Neck Creek, thence up creek a southeast course to a small gut on edge of marsh, known as Wolf's Gut, thence north through marsh a direct line to white oak on edge of marsh, the beginning." She avers that her grantor had up to the date of the deed held and owned this land, which had been assessed

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to him on the land books of the county; that he had paid taxes upon it from the year 1868 until the present time; and that "his ancestors have owned, held, used and enjoyed and paid taxes on the same certainly from about the year 1831 to 1868;" that said sunken ground or marsh is estimated to contain a little more than 100 acres, and is chiefly used for hunting and trapping. The bill then charges that J. R. Austin had procured the assignment of a part of a Land Office Treasury Warrant, and had unlawfully located the same upon plaintiff's land, and had fraudulently obtained a patent or grant from the State and caused the same to be recorded in James City county; that the plaintiff's land was not at the date of said unlawful entry either vacant, unappropriated, or liable to entry, as alleged by Austin; that she is greatly injured by what has been done; and that the grant from the Commonwealth constitutes a cloud upon her title. She prays, therefore, that J. R. Austin may be made a party defendant to the bill; that the grant or patent be declared void; and that the defendant and all others claiming under him may be restrained from disturbing the plaintiff in the full and quiet enjoyment of her land.

Austin answered this bill, denying plaintiff's title and claiming title in himself, and with respect to the land warrant states that he only took it out of abundant caution, and that his title to the land in controversy is complete without reference to the warrant. He prays that his answer may be treated as a cross-bill, and then goes on to set forth his title to the property in controversy and prays that he may be quieted in its title and enjoyment.

To this answer, treated as a cross-bill, the plaintiff filed what is styled a replication, but is in point of fact an answer and was so considered by the parties, who proceeded without objection to take evidence upon the issues of fact thus presented. The evidence is voluminous, covering a long period of time, and tending to prove use and enjoyment of the property upon the part of plaintiff and defendant, such as hunting, shooting, fish-



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ing and trapping upon the disputed premises. Upon the proof the Circuit Court held that the grant from the Commonwealth to the defendant, J. R. Austin, was issued contrary to law and to the prejudice of plaintiff's rights, that it be annulled and declared void, so far as the land in dispute between the plaintiff and defendant is concerned; "and the court being also of opinion that said land called 'Sunkin Marsh,' bounded and described as containing one hundred acres in the deed from John W. Minor to the plaintiff dated 16th day of November, 1903, has been for many years, certainly ever since 1868, in the continued, uninterrupted possession of the plaintiff and those under whom she claims, claiming title thereto, asquiesced in by those under whom defendant claims the adjoining land known as 'Indian Field' and 'Clarks'; and the said 'Sunkin Marsh' is not appurtenant to said land of the defendant or included within the boundaries of the said tracts known as 'Clarks' and 'Indian Field,' doth adjudge, order and decree that said land called 'Sunkin Marsh' belongs to and is the property of the plaintiff, Roselia A. Minor under the last mentioned deed." From this decree an appeal was taken to this court.

"The jurisdiction of courts of equity to remove clouds from title, where the party complaining has no adequate remedy at law, is well settled. This is particularly the case where he is the owner of the legal title, and is in possession of the land upon the title to which the cloud rests." *Va. Coal & Iron Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020.

The jurisdiction of a court of equity to remove clouds from title was the subject of consideration in *Carroll v. Brown*, 28 Gratt. 791, and in *Stearns v. Harman*, 80 Va. 48, where it is said that on the principle of *quia timet*, a court of equity will entertain a suit by the owner in possession of land, to remove a cloud from his title, by annulling a deed that, by mistake or fraud, conveys the land to another, who makes adverse claim thereto, but brings no suit; but that the proper remedy is by

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an action of ejectment where the owner holds the legal title but has not actual possession, and another asserts an adverse claim to the land, but has not actual possession of it. In such case equity has no jurisdiction. Citing *Harvey v. Tyler*, 2 Wall. 328.

In *Otey v. Stuart*, 91 Va. 714, 22 S. E. 513, Judge Buchanan delivering the opinion of the court said: "The allegations and prayer of the bill show that it is a bill filed for the purpose of removing a cloud upon the title to the land in question. As a bill to remove a cloud from their title it is also fatally defective. A court of equity, as a general rule, in the absence of statutory authority, does not entertain a bill of this character if the party filing it claims to be the owner of the legal title, unless he is in possession of the land upon which the cloud rests. The jurisdiction exercised by courts of equity in this class of cases, is founded upon the theory that the party making it has no adequate remedy at law for the injury of which he complains. If he is out of possession, and is the owner of the legal title, he has ordinarily a complete remedy at law by an action of ejectment."

Let us first consider appellee's title. J. W. Minor, by his deed of the 16th of November, 1903, before referred to, conveyed to Roselia A. Minor 189 $\frac{3}{8}$  acres, which embraced the 100 acres in controversy. J. W. Minor, her grantor, claims under two deeds—one from Geo. W. Minor to Jno. W. Minor, dated September 21, 1888, conveying 150 acres, more or less, "being a portion of the tract on which the said George W. Minor now resides, and known generally by the name of Bush Neck and bounded as follows: "Commencing at a red oak near the stone landing, northeast course across the field to a sweet gum standing on an old ditch; thence E. course to a willow on the hill, thence same course to a white oak a corner line where it joins the tract of land called Indian Field, thence northeast to a pine tree near Bush Neck Road where it joins the land

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on which Ned Wallis now resides, thence W. West course to a pine tree standing on the edge of Buzzard Island Marsh, thence same course down said marsh to Buzzard Island Bay, thence down said bay to Chickahominy River, thence South W. course down the said river to the mouth of Bush Neck Creek, thence up the said creek to the stone landing, the point first started from." And by deed from R. L. Henley, a special commissioner appointed by the decree of the Circuit Court of the County of James City and city of Williamsburg on the 11th day of November, 1887, in the consolidated chancery suits of *Hankins & Taylor, trustees, v. Minor, &c.*, and *Same v. Garrett, &c.*, and *Davis v. Minor*, conveying to John W. Minor "that certain tract of land called 'Bush Neck' containing by estimation  $189\frac{3}{4}$  acres, bounded on the north by the lands of John W. Minor, west by Bush Neck Creek, south by 'Indian Field.'"

Austin's title, as shown by the deeds which he files, is also derived in part from Geo. W. Minor, who on the 24th of September, 1868, conveyed to Melchisedec Spraggins a parcel of land containing  $129\frac{1}{2}$  acres, "being the same tract of land on which John Nettles now resides, and bounded as follows: Commencing at a point of marsh on Bush Neck Creek and near the landing on Utopia Island and running N. E. course along a line of marked trees to a gum near the land on which Ned Wallace now resides, thence S. E. to a cedar standing in a valley near the Sunkin Marsh, thence down said marsh S. W. course to Bush Neck Creek, thence down the said creek to the point of marsh first started from." Spraggins conveyed this tract to John Nettles by deed of September 1, 1871. On the 19th of November, 1870, Freeman and wife conveyed to John Nettles all their title and interest, being one-half of  $129\frac{1}{2}$  acres which Thomas T. Clarke, the father of Elizabeth M. Freeman, purchased of William Durfey, situate in Bushes Neck, James City County, Virginia, adjoining the land of John Nettles and others. On the 29th of April, 1871, John W. Clarke and wife conveyed to John Nettles what seems to

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be the other undivided moiety of this 129½ acre tract of land. John Nettles, by his will dated the 20th of February, 1899, devised all his estate, real and personal, to his daughter, Harriet A. Rogers, subject to the dower right of his wife, Virginia Nettles; and on the 21st of July, 1900, Harriet A. Rogers and her husband conveyed to Sands Gayle, "that certain tract, piece or parcel of land containing one hundred and twenty-nine and one-half (129½) acres, located in Powhatan District, James City County, Virginia, and bounded on the northwest by the Main Road, on the northeast by the Canady tract of land, on the southeast by Gordon's Creek and Sunkin Marsh, and the southwest by the Indian Field tract, being the tract of land formerly known as the Clark tract, which was willed to the said Harriet A. Rogers by her father, the late John Nettles . . ." And by deed of the 23rd of October, 1900, Harriet A. Rogers and her husband, and Virginia Nettles, the widow of John Nettles, conveyed "All that certain piece or parcel of land with the appurtenances and privileges thereto belonging, located in James City county, Va., containing about 129½ acres, being known as 'Indian Field,' and described in a certain deed from G. W. Minor to Melchisidec Spraggins dated the 24th day of Sept., 1868, as commencing at a point of marsh on Bush Neck Creek and near the landing on Utopia Island and running N. E. course along a line of marked trees to a gum near the land on which Ned Wallace now resides, thence S. E. to a cedar standing in a valley near Sunkin Marsh, thence down said valley until it strikes Sunkin Marsh, thence down said marsh S. W. course to Bush Neck Creek, thence down said creek to a point of marsh first started from, which deed is recorded in the clerk's office of the County Court of James City Co., in Deed Book Vol. 2, page 190—which land was conveyed to John Nettles by deed from Spraggins recorded in said clerk's office in Deed Book 2, Vol. 424, and willed by said John Nettles to said Harriet A. Rogers, by will recorded said clerk's office in Will Book Vol. 2, page 42—to which deeds reference

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is herein made for the purpose of more clearly indicating the land hereby conveyed, the same being sold gross as a farm, and not by the acre."

It seems then that appellee claims under John W. Minor, and that he did, by his deed of the 16th of November, 1903, attempt to convey the 100 acres of land now in dispute, but the deeds under which he held title do not in their terms embrace that land, nor do they bring the land embraced within their boundaries into any physical connection or touch with the land in dispute. On the contrary, reading the courses and distances in connection with the plat and surveys filed in the record, it appears that the land known as "Indian Field" and the "Clark" tracts, title to each of which is in J. R. Austin, are interposed between the lands of J. W. Minor and the Sunkin Marsh. An attempt is made to meet this difficulty by reference to an old plat which purports to have been made in 1831, upon which there is this memorandum: "This line cuts all the marsh from the high land of Mr. Warburton by agreement of W. & M., except about 20 acres annexed to Rye Patch tract;" and a further memorandum to this effect: "This plot including the marsh contains five hundred and seven acres and a half, being the half of Bush Neck tract purchased by Warburton & Minor, and such plot is for the benefit of John Minor." That plat with the memoranda upon it is a circumstance to be considered in the determination of boundaries and title, but does not in itself constitute title.

When we come to consider appellant's claim of title it appears that he is the owner of land which is contiguous to the marsh in controversy, and his claim is that the marsh belongs to him as appurtenant to his riparian rights.

There is in the testimony of one witness a statement from which it may be inferred that the tide ebbs and flows over this marsh. J. F. Martin was asked: "Did you trap anywhere near he was trapping? A. I trapped out there as far as I could walk, or land with a boat when the tide was low. Q. Now

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is it not a fact that in trapping the traps are set when the tide is low and the musk rats and other game taken out when the tide is high? A. It depends on what sort of marsh you are trapping on." This is the only direct statement to be found in the record as to the ebb and flow of the tide. It does not give the high water mark or the low water mark, nor the relation of the land in dispute to high and low water mark, and is therefore insufficient to enable the court to say what are the riparian rights of appellant, if any such there be. It is plain from the evidence that the disputed property is a marsh, but is it a marsh, over the whole of which the tide ebbs and flows? Does it ebb and flow up to the boundary of appellant? These are questions to which the proof does not enable us to give a certain and definite answer.

When we come to consider the question of possession, it appears that the property in dispute was valuable only for hunting, fishing and trapping, and to a limited extent as a range for hogs. A great many people seem to have hunted, fished and trapped upon it. Those under whom appellee claims, it may be conceded, used and enjoyed it in all those respects in which it could be used and enjoyed far more than any one else; but it was also hunted over, used and enjoyed by appellant and others than the appellee. There was no such use and occupation of it by any one as is necessary to constitute adversary possession, which must be open, notorious, exclusive, continuous and adverse.

Is the property in question capable of such enjoyment as accompanied by a claim or color of title would ultimately ripen into a good title? If the tide ebbs and flows over this property, it is doubtful whether a title by adverse possession can be acquired to it, separate and distinct from the rights of the riparian owner. *Rowe v. Strong*, 107 N. Y. 350, 14 N. E. 294.

In *Taylor v. Burnside*, 1 Gratt. 202, it is said that "wild and uncultivated lands cannot be made the subjects of adversary possession, while they remain completely in a state of

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nature. A change in their condition, to some extent, is therefore essential; and the acts by which it is effected are often the strongest evidence of actual possession. Without such change, accomplished or in progress, there can be no residence, cultivation or improvement; no occupation, use or enjoyment. Evidence short of this may prove an adversary claim; but, in the nature of things, cannot establish an adversary possession. Nor is there any reason for relaxing the rules of law on this subject in behalf of the adversary claimant on such property. There ought to be no presumption in his favor against the better title. It is in vain for him to say that he has had all the possession of which the property was then susceptible; for that would lead to a constructive possession, which is only attributable to the rightful owner."

In *Harman v. Ratliff*, 93 Va. 249, 253, 24 S. E. 1023, it is said: "While lands remain uncleared, or in a state of nature, they are not susceptible of adverse possession against the older patentee, unless by acts of ownership effecting a change in their condition, and to constitute adverse possession there must be occupancy, cultivation, improvement or other open, notorious, and habitual acts of ownership."

Those cases are, of course, not direct authority for the point under consideration, but the principle which controls them would seem to apply with much force to the case under consideration.

In *Taylor v. Burnsides* and in *Harman v. Ratliff* it was held that in order to acquire title by adverse possession to wild lands there must be some change in their physical condition as a visible evidence of occupation and ownership. The argument upon which the conclusion rests would seem to apply with equal if not greater force to land under water, subject to the ebb and flow of the tide, upon which it is difficult if not impossible to erect any visible and permanent evidence of occupation.

We are of opinion that neither upon the issue of title nor of possession has a case been made out, either by appellant or

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appellee, which justifies the interposition of a court of equity to take jurisdiction over the subject in order to remove the cloud upon the title, but that the parties should have been left to proceed at law to establish their rights, where the whole subject can be inquired into and determined by a jury.

We are of opinion that the decree of the Circuit Court should be reversed, and the bill of plaintiff in the court below and the cross-bill be dismissed with costs to the appellant.

*Reversed.*



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**Wytheville.**

## SMITH v. SMITH'S EXECUTOR AND OTHERS.

June 13, 1907.

1. INFANTS—*Marriage Settlements—Disaffirmance.*—If an infant *feme.* upon the eve of her marriage, unites with her intended husband in settling her real estate upon herself and the contemplated issue of such marriage, the act is voidable, and can be disaffirmed by her, when the disabilities of infancy and coverture have been removed, where she has, in the meantime, done no act to ratify or affirm such settlement. *Tabb v. Archer*, 3 Hen. & M. 399 is disapproved so far as it conflicts with this case.

Appeal from a decree of the Circuit Court of Rappahannock county. Decree for the defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*Barbour & Rixey*, for the appellant.

*Grimsley & Miller, H. G. Moffett, James F. Strother*, and *R. Walton Moore*, for the defendants.

HARRISON, J., delivered the opinion of the Court.

It appears from the record of this case that Mary E. Smith, the appellant, formerly Mary E. O'Bannon, was born in September, 1857, and was married to Hugh M. Smith in October.

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1874, just one month after her seventeenth birthday; that she was the only child of Walter O'Bannon, who died intestate in July, 1870, leaving a large real and personal estate, the real estate being situated in the counties of Culpeper and Madison; that Elizabeth F. O'Bannon, the mother of appellant, qualified as the administratrix of her deceased husband, Walter O'Bannon. It further appears that two days before the marriage of appellant her uncle, Jacob S. Eggborn, qualified as her guardian, and that on the day before her marriage, she, her intended husband, her guardian, and her mother, who was named as trustee, signed a deed of marriage settlement by which one-half of the real and personal estate derived by appellant from her father was conveyed to her mother, Elizabeth F. O'Bannon, to be held by her in trust for the sole and separate use of appellant during the intended coverture, and in the event such coverture should be terminated by the death of appellant, then the said trustee to hold the real and personal property mentioned in trust for the issue, if any, of said marriage, taking *per stirpes*, and if no issue, then in trust for the mother, Elizabeth F. O'Bannon; and in the event the coverture be terminated by the death of Hugh M. Smith, the intended husband, then the trustee named is to hold all the property mentioned in trust for the sole and separate use of appellant during her natural life, and after her death for the issue of the intended or any future marriage, taking *per stripes*, and upon the further trust, if the appellant should die without issue, then in trust for her mother, Elizabeth F. O'Bannon, the trustee, and upon the further trust, from and after the solemnization of the intended marriage, to sell, exchange and convey, by and with the concurrence in writing of appellant, all or any of the property conveyed, and invest the proceeds upon the same trusts as those set out and declared in the deed. It further appears that the provisions of this deed of settlement were never carried out in any particular, or regarded as binding by any of the parties thereto. So far as appears from the record, the paper was never seen

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or mentioned until the year 1897, more than twenty years after its date, when it was accidentally discovered in an old bundle of promiscuous papers, which was in the possession of Elizabeth F. O'Bannon, the trustee, who said, when asked what it was, that "it was an old contract drawn between Mollie and Hugh about the time of Mollie's marriage, but that they had gone on without it, and that it was never recognized or acted upon," winding up her remarks in regard to the paper with these words: "It ain't no account, I can tell you that." This view of the contract is confirmed by J. S. Eggborn, the guardian, who says: "It was certainly never carried out. I do not think it was ever regarded as anything either. And it was certainly never lived up to by any of them."

Some time in the year 1900, after the death of Hugh M. Smith, the husband, and Elizabeth F. O'Bannon, the trustee, and after dissension had arisen between the appellant and some of her children, this old deed of marriage settlement was secured by Walter O'B. Smith, a son of appellant, who claimed that it was a valid and binding instrument, and had it admitted to record in the county court clerk's office of Culpeper county.

Thereupon, the bill in this case was filed, in October, 1900, by the appellant, in which she sets forth substantially the facts already recited, and further alleges that the subject of a marriage contract was never mentioned in her presence until the day before her marriage, when she was presented with a paper and informed that it was necessary for her to sign it; that she never understood and was incapable of understanding it, and was told that it was a mere form; and that the provisions of the contract in question were greatly to her disadvantage, containing no provision whatever for a settlement on her from the estate of her husband, either present or prospective. It is further alleged that the contract in question was, from the time it was signed, treated as a nullity; that no part of the property mentioned therein was ever held or controlled by her mother, the trustee named in the deed; and that all of such real and

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personal property was turned over to the husband by her mother, who was the administratrix of her father's estate. The complainant further alleges that, by reason of her infancy at the time of its execution, the marriage contract under consideration was either totally void or voidable at her election; that she has never recognized its validity; and prays that it may be declared null and void.

Two of the adult children of the appellant file a joint and separate answer, in which they disclaim any knowledge of the circumstances which led up to the marriage contract, but express their belief in the truth of the allegations of the bill, and unite in the prayer that the contract be declared null and void. W. O'B. Smith, an adult son, the executors of Hugh M. Smith, and the guardian *ad litem* of the infant children of appellant, file demurrers and answers denying the allegations of the bill and insisting upon the validity and binding force of the marriage contract sought to be avoided by the complainant.

The allegations of the bill, in all material particulars, are substantially sustained by the proof. The record shows that all that is left to appellant of the inheritance from her father is a part of the real estate; that the personal property and a large part of the real estate, which she united with him in conveying to purchasers, was consumed during her husband's lifetime. It further appears that the appellant, acting without regard to the marriage contract, both before and since her husband's death, has so dealt with her rights as to very largely impair them, if the marriage contract, which had passed from the knowledge and memory of all the parties concerned, were now upheld and enforced.

Laying aside all inquiry into the suggestions urged by appellant, as to the injustice of requiring her to abide by the settlement here involved, under the circumstances of this case, we come to a consideration of the clear-cut question, whether or not an infant female, who, on the eve of her marriage, unites with her intended husband, her guardian, and her mother, in

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settling her maiden lands, through the intervention of a trustee, upon herself and the issue, if any, of her proposed marriage, can, after the disability of infancy and of coverture have been removed, disaffirm and annul such settlement, when she has in the meantime done no act to ratify or affirm the same.

At an early day in England, the disposition seemed to be to answer this question in the negative, upon the theory that infants may marry, and as incident to the contract of marriage can bind themselves by a settlement made in contemplation of such marriage. *Harvey v. Ashley*, 3 Atkyns 607; *Cannel v. Buckle*, 2 P. Wms. 243. It was not many years, however, until this view was abandoned, and the doctrine firmly established, that the real estate of a female infant was not bound by the settlement on her marriage, because her real estate does not, like personalty, become by the marriage the absolute property of the husband, although by the marriage he takes a limited interest in it. *Durnford v. Lane*, 1 Bro. C. C. 106; *Caruthers v. Caruthers*, 4 Brown's R. (Eden) 499; *Clough v. Clough*, 5 Ves. 710; *Milner v. Lord Harewood*, 18 Ves. Ch. R. 258.

In Schouler's Domestic Relations (5th ed.), sec. 399, the law of England, as it is now and has been for more than one hundred years, is stated as follows: "With respect to the marriage settlement of infants, there was formerly considerable controversy. For, on the one hand, it was urged that infants were, in general incapable of entering into valid contracts with respect to their property; on the other, that since infants might make a valid contract of marriage, they ought to be able to arrange the preliminaries. At an early period the opinion prevailed in England, that the marriage consideration communicated to the contract of infants, respecting their estate, an efficacy similar to that which the law stamps upon marriage itself; and Lords Hardwicke and Macclesfield contributed to strengthen it, by maintaining that the real estate of an infant would be bound by a marriage settlement. Lord Northington held later to a different opinion; and Lord Thurlow overturned

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the doctrine altogether, boldly declaring that the contracts of male and female infants do not bind their estates, and that consequently a female infant cannot be bound by any articles entered into during minority, as to her real estate; but may refuse to be bound, and abide by the interest the law casts upon her, which nothing but her own act, after the period of majority, can fetter or affect. Other distinguished equity jurists, including Lord Eldon, subsequently expressed their approval of Lord Thurlow's decision. And the rule became settled within the next fifty years, that the real estate of a female infant was not bound by the settlement on her marriage, because her real estate does not become, by the marriage, the absolute property of the husband, although by the marriage he takes a limited interest in it. So it was decided that neither the approbation of the parents or guardians, not even of the court of chancery, independently of positive statute, would make the infant's settlement binding." After mentioning a statute passed in England in 1855, authorizing infants, not under a certain age, to make valid settlements, with the approbation of the court of chancery, the learned author says: "But, aside from the operation of such a statute, an infant who becomes a party to a marriage settlement may repudiate it within a reasonable time after attaining majority." See also Wharton on Contracts, sec. 73; Bishop's Law of Married Women, Vol. 2, sec. 518.

In Addison on Contracts, Vol. 3, sec. 1365, p. 458, it is said: "If the male party is of age, and the female party under age, all the leasehold property and general personal estate of the female infant comprised in the settlement will be bound thereby, because such personal estate becomes, by the marriage, the absolute property of the husband, and the settlement is, in effect, a settlement by the intended husband of the property he is about to acquire by the marriage; but the real estates of inheritance of the female infant are not bound by the settlement, as she has no power of disposition over them during her

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minority. . . . If she survives the husband, her power over her real estate is the same as if no settlement had ever been made. If the husband survives, he holds such real property for his life, if he had issue by the wife, born during the coverture which might by possibility inherit the estate as her heirs; and on his death it descends to the wife's heir at law, whatever may be the terms and provisions of the settlement."

In 22 Cyc. 537, it is said: "An infant female may settle her personalty at marriage, for such settlement cannot be to her prejudice, but must be to her advantage if it secures anything to her or her issue, since, without the settlement, the whole would go to the husband absolutely on her marriage; but the weight of authority seems to support the view that she cannot bind herself by a settlement of her real estate on marriage, although such a settlement is usually considered voidable only and not void."

This subject has received but little judicial consideration in the United States. So far, however, as it has been dealt with by the courts, the decisions are generally of a like tenor with those of England. *Temple v. Hawley*, 1 Sandfords, Ch. R. (N. Y.) 153; *Levering v. Levering*, 3 Md. Ch. R. 365; *Lancaster v. Lancaster*, 13 Lea (Tenn.) 126; *Satterfield v. Riddick*, 8 Iredell's Eq. (N. C.) 265; *Shaw v. Boyd*, 5 Serg. & Rawl. (Pa.) 309, 9 Am. Dec. 368.

These authorities show that, for many years, the doctrine has prevailed both in England and in this country, that an infant female may settle her personalty at marriage, because such settlement cannot be to her prejudice, since, without the settlement, the whole would go to the husband on her marriage; but that she cannot bind herself by a settlement of her real estate on marriage, such a settlement being considered voidable by her. It may be remarked in this connection, without intending to express any opinion upon it, the question not arising in this case, that the reason given for the distinction between the real and personal estate of a female infant would seem to

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have lost much of its force in Virginia, where, under the present married woman's law, her personal estate is substantially in the same position as her real estate.

We will now consider the cases in Virginia which have touched the question before us.

The first case, and the only one where the subject was involved, is that of *Tabb v. Archer* (1809), reported in 3 Hen. & M. 399, 3 Am. Dec. 657. There were two cases heard together and reported under the one title, both involving the marriage articles of daughters of Mrs. Tabb, one of whom married Dr. Archer, and the other Dr. Randolph. Dr. Archer's wife was an adult at the time of her marriage; Dr. Randolph's bride was an infant. Both settlements involved real estate. The husbands and wives, in both cases, sought to invalidate the settlements by each husband uniting with his wife in conveying all of the settled property. Dr. and Mrs. Randolph conveyed all of theirs to a trustee, who, the next day, re-conveyed it to Dr. Randolph absolutely. The mother, Frances Tabb, as next friend to the infant issue of each, and in her own right, filed bills to set aside these conveyances. Judge Tucker delivered the opinion in the Archer case, where no question of infancy was involved, holding the articles valid. In his opinion he says: "And although the rights of an infant, party to such an agreement, to real estate may not, perhaps, be bound by any agreement in relation to it, unless there be issue of the marriage (as there has been in this case), yet, as to personals, her interest may be bound by agreement on the marriage; and if the parents or guardian cannot contract for the infant, so as to bind that property, the husband as to the personal estate, would be entitled to the absolute property in it immediately on the marriage. And Lord Hardwick said, he knew of no precedent where a marriage agreement had been called in question, where it had been made (as in that case), with consent of parents and guardians."

The first sentence quoted seems to recognize fully the dis-



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inction made in the authorities between real and personal property, a distinction fully recognized by Lord Hardwick in the early case of *Harvey v. Ashley*, *supra*.

Judge Roane, who seems to have dealt more particularly with the infant's case, disposes of the subject by saying: "In the first place, it is objected that Mrs. Randolph was an infant at the time of executing the agreement, which, therefore, shall not bind her. The answer is, that infants may marry, and, as essential thereto, may contract by means of marriage settlements." Citing *Harvey v. Ashley*, *supra*, and *Seamer v. Bingham*, 3 Atk. 54, two of the earliest of the English cases, already adverted to, the last of which had no bearing whatever on the subject dealt with. The learned judge made no reference to the then well-recognized distinction between real and personal estate. It cannot, however, be denied that the decision in *Tabb v. Archer* intended to, and was understood to, announce the principle, that marriage articles made between an infant *femme* and her intended husband, beneficial to her and her contemplated issue, were obligatory upon the parties, and would be enforced in a court of equity.

An important distinction between that case and the case at bar is in the fact that, in *Tabb v. Archer* the husband, while the wife was under the disability of coverture, was uniting with her to defeat the marriage settlement by means of conveyances vesting the whole property absolutely in him; while, in the case at bar the husband is dead, and the wife is proceeding, in her own right, to have annulled a contract made during her infancy.

It has long been a well settled doctrine that a court of equity will not permit the husband to aid the wife in defeating the marriage settlement and alienating or disposing of the property. Addison on Contracts, p. 458; *Lee and wife v. Stuart*, 2 Leigh, 82; 21 Am. Dec. 599.

In the case last cited, which is the second in Virginia touching the subject under consideration, it appears that Ann

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McCarty, an infant, prior to her marriage with Henry Lee, an adult, and in consideration thereof, conveyed to trustees all her lands and slaves for the use of herself and husband during their lives, and to the survivor, with remainder to their issue; and in 1822 Lee and wife exhibited their bill, among other things, to annul and avoid the marriage settlement between them in respect to the real estate thereby conveyed, upon the ground that it was executed by the wife while she was an infant. The decree was against them, the court saying: "There is no shadow of ground upon which a court of equity can set aside or declare the marriage settlement void, or lend its aid to assist the appellants in attaining their object in this respect. Lee was a party to the deed, and is bound by it; and no fraud or imposition on him being suggested, no court can, under any pretence, relieve him from the obligation of it. He covenanted with the trustee to execute any further conveyance, and otherwise to give full effect to the provisions of the settlement. The object of the present proceeding is to procure the aid of the court to enable him to violate that covenant. For the only purpose and effect of setting aside the deed of settlement, would be to enable his wife to dispose of the property for his benefit, or according to his pleasure, since she could make no disposition of it without his concurrence. So far from a court of equity assisting him to frustrate the settlement, it ought to interfere, if necessary, to prevent him from assisting her in defeating it. *Durnford v. Lane*, 1 Bro. C. C. 106; *Miller v. Harewood*, 18 Ves. 279."

In this case of *Lee v. Stuart*, the learned counsel for appellants argued that a deed of marriage settlement of land, made by an infant grantor, was of no binding effect whatever on the infant. Citing *Caruthers v. Caruthers*, *supra*, and *Clough v. Clough*, *supra*. If at that time *Tabb v. Archer* was considered as having settled the point that an infant *femme* could bind her real estate by marriage articles, it would seem that Mr. Stanard, the learned counsel who upheld the settle-

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ment in this case, would have replied to this argument simply by citing and relying on it. This he did not do, but practically admitted the position taken by counsel for the appellants, saying: "The question is not whether the court may not, hereafter, when Mrs. Lee's coverture shall have determined, entertain a bill on her behalf to set aside this marriage settlement of her real estate, on account of the disability of infancy she lay under at the time she executed it, but whether the husband and wife, during the coverture—in other words, whether the husband, in the name of his wife, while she remains under a disability equal to that of infancy—shall be entertained to impeach the validity of the settlement, on the mere ground that the wife was disabled by reason of infancy to execute such a deed." He maintained further, that if the wife was disabled by infancy to execute the settlement, she was equally disabled by coverture to annul or avoid it. The whole argument of counsel, the opinion of the court, and the authorities cited, show very clearly, though the question at issue was not directly involved, that the mind of the bench and bar at that time were in harmony with the English doctrine as to the binding force of such settlements, and the conditions under which they could and could not be avoided.

The only other Virginia case which has been found, bearing on this subject, is *Healy v. Rowan*, 5 Gratt. 414, 52 Am. Dec. 94. In that case a marriage settlement was involved, which was held not binding upon the wife, upon the ground that the articles, which were entered into between her guardians and intended husband before marriage, and while she was an infant, had never been executed by her. In this case, Judge Baldwin, who delivered the opinion, said, that he perceived nothing to disapprove in the decision of the court in *Tabb v. Archer*, admitting afterwards that the principle there involved was not applicable to the case before him. Judge Allen united in the judgment of the court, expressly declining an opinion upon the question, whether it was competent for an infant to bind his

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real estate by a marriage settlement, it not being necessary to the decision of the case. With great respect for the learning and ability of Judge Baldwin, this confessed dictum cannot be regarded as establishing a doctrine in Virginia which is contrary to the current of decisions and text-writers in England as well as the United States at large.

This review of the subject leads us to the conclusion, that, both upon reason and authority, when an infant *femme*, upon the eve of her marriage, unites with her husband in settling her real estate upon herself and the contemplated issue of such marriage, the act is voidable and can be disaffirmed by her, when the disabilities of infancy and coverture have been removed, where she has, in the meantime, done no act to ratify or affirm such settlement. To the extent that the decision in the case of *Tabb v. Archer, supra*, decided by this court in 1809, conflicts with the conclusion reached in this case, it is disapproved.

The appellant, being an infant when the settlement involved herein was made, and having done no act to affirm the same, and having proceeded to disaffirm it soon after her disability was removed and as soon as rights were claimed under it adverse to her interests, she is entitled, in accordance with the prayer of her bill, to a decree annulling the contract and deed of marriage settlement, dated October 20, 1874, in so far as it affects her right in and to the real estate mentioned therein. This conclusion makes it unnecessary to consider other assignments of error.

For these reasons the decrees complained of must be reversed and the cause remanded for further proceedings not in conflict with this opinion.

*Reversed.*

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Statement.

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**Wytheville.****FINCH AND OTHERS V. CAUSEY AND WOODWARD.**

June 13, 1907.

Absent, Keith, P.

1. **PRINCIPAL AND AGENT—*Representations of Agent—Admissions after Termination of Agency.***—While a principal is bound by the representations of his agent made while negotiating a lease for him, he is not bound by the admissions of such agent made after the lease has been entered into.
2. **CANCELLATION OF INSTRUMENTS—*Fraud—Mistake.***—While mistake as well as fraud furnishes ground for rescinding contracts, an executed contract will not be rescinded in either case unless the fraud be satisfactorily established or the mistake be plain and palpable, and affect the very substance of the thing contracted for.
3. **CANCELLATION OF INSTRUMENTS—*Case in Judgment—Defective Title of Lessor—Notice.***—The facts of this case do not warrant a rescission of the executed contract of lease in controversy, even if the lessor did not have complete title to an insignificant part of the leased premises at the time the lease was made. Notice to the husband of the lessor of the defective title and of the lessee's desire or intention to rescind was no notice to the lessor, who had executed the lease in person which the husband had no power to make. No notice was given to the lessor herself until eighteen months after the discovery of the defect, which was then immediately remedied.
4. **PRINCIPAL AND AGENT—*Special Agent—Written Authority—Notice.***—A party dealing with an agent acting under written authority, must take notice of the extent and limits of that authority.

Appeal from a decree of the Corporation Court of the city of Newport News. Decree for complainants. Defendants appeal.

*Reversed.*

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The opinion states the case.

*S. O. Bland, J. L. Jeffries and S. R. Buxton*, for the appellants.

*H. B. Pollard, O. D. Batchelor and Maryus Jones*, for the appellees.

BUCHANAN, J., delivered the opinion of the Court.

The appellees, F. A. Causey and W. W. Woodward, instituted this suit against Mrs. M. A. Finch and F. F. Finch, her husband, to rescind a lease of a certain lot in the city of Newport News, on the ground that it was procured by the fraudulent representations of the lessor, Mrs. Finch, and of her husband, who was acting as her agent in making the lease.

It appears that on the 19th of October, 1899, Mrs. Finch made a lease, in which her husband united, to Causey and Woodward of a lot situated in the city of Newport News, on Washington avenue, between 32nd and 33rd streets, being lot No. 25 in block No. 203, as shown on a plat, and described in the lease as fronting on Washington Avenue 25 feet, and running back thence between parallel lines and parallel with 33rd street 95 feet to a five-foot alley to be used in common. The lease was for a term of forty years, at a rent of \$420 *per annum* for the first five years, and of \$540 *per annum* for the remaining thirty-five years of the term. The lessees bound themselves to erect upon the leased premises within six months from the date of the lease, a three-story brick building, which was to cost \$2,500. Mrs. Finch covenanted that she, her heirs, personal representatives and assigns would warrant the title to the property from "all claims thereon under or by the lessor or any person claiming by, from or under her." There are other provisions of the lease not material to the questions involved here. The lease was properly acknowledged and recorded, and the rent for the first year paid.

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The ground relied upon by the lessees, as stated in their bill, for a rescission of the lease is, that the lessor, and her husband as her agent, represented to the lessees when the lease was made that the lessor, Mrs. Finch, owned the whole of the leased lot when they knew that the Old Dominion Land Company claimed title to a portion of it, and that they fraudulently concealed such defect from the lessees; that the lot was leased for the purpose of erecting a store-house upon it and the lot adjacent to it, which would cover the whole of both lots, and that the purpose for which they were leasing it was known to the lessor and her husband; that the lessees were arranging and planning to build the store-house thereon when they discovered the said defect in the title, of which they notified Mrs. Finch's husband and agent, and informed him that less than the whole lot would not suit their purposes, and demanded that he should take it back and refund their money, at the same time offering to reconvey the lot to Mrs. Finch; that the husband and agent then informed the lessees that there was some trouble with the Old Dominion Land Company as to a part of said lot, but requested them not to mention the defect to that company, and that he would arrange it either by giving the lessees a clear title or refund their money and take back the lot; that the lessees relied upon the representations that Mrs. Finch was the owner of the whole lot and believed it to be true; that the entire lot was necessary for their purposes, and that they would not have leased it if they had known of the defect of title; that as Mrs. Finch only warranted the title to the leased premises specially they have no remedy at law, and can only go into a court of equity for relief.

Mrs. Finch, in her answer, which was filed as of January 8, 1903, denied all the charges of fraudulent representations made in the bill, and also denied that the Old Dominion Land Company owned any portion of the leased premises, but alleged that since the institution of this suit, she had discovered that that corporation did assert some claim of title to a very small portion of the leased premises which could be procured for a

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nominal sum, and that she had purchased all the right, title and interest of that company in and to that small strip of land claimed by it, which made her title to the whole of the lot indefeasible.

On the hearing of the cause in January, 1906, Mrs. Finch filed in open court a deed from the Old Dominion Land Company, dated May 20, 1902, to R. G. Bickford, the counsel who filed her answer, conveying all its interest in that portion of the leased premises claimed by it, and a deed from Bickford to her conveying the same interest, dated April 15, 1905.

The portion of the leased premises claimed by the Old Dominion Land Company is a very narrow strip of land at one corner of the rear end of the lot, triangular in shape, whose sides are less than  $10\frac{1}{2}$  feet in length, whose base is less than one foot in width, and contains less than  $5\frac{1}{4}$  square feet. Including that company's claim in the five-foot alley in the rear of the lot, which the lessees have the right under their lease to use in common, the triangle in dispute contains less than  $11\frac{1}{2}$  square feet.

It appears that some time in the summer of 1900, probably in June or July, the Old Dominion Land Company discovered that it had an interest in the leased premises, and notified the lessees that it claimed a small portion of the leased premises. The lessees within a month or two thereafter notified the husband of Mrs. Finch of the defect, that they desired that the matter should be settled and would cancel the lease. The lessees proved that it was a matter of common notoriety in the city of Newport News prior to the making of the lease that Mrs. Finch's husband conducted all business negotiations on behalf of his wife in connection with the leasing, management and other disposition of her property, but her power of attorney to her husband, which was recorded in the clerk's office of the Corporation Court of the city of Newport News, shows that while he was authorized to receive and sue for all moneys due his wife, and in his discretion to compromise such claims, he



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was not authorized to lease her real estate for a longer period than ten years, or to renew leases for terms exceeding that time. In the fall of 1900 Mrs. Finch and her husband separated, which separation was generally known in the city of Newport News, and after that time he had no further control of her property, except for the collection of certain rents under a decree of court. While it appears that there was some controversy between the Old Dominion Land Company and Mrs. Finch, each of whom owned large boundaries of land adjoining each other, as to their boundary lines, there is nothing in the record to show that Mrs. Finch had any knowledge of the claim of the Old Dominion Land Company to any portion of the leased premises, or of the desire of the lessees to rescind the lease, until the institution of this suit in February, 1902. The lessees proved certain admissions of her husband and agent, that he knew that the Old Dominion Land Company claimed some interest in the leased premises, but as these admissions were not made until after the lease had been entered into, they were not admissible against Mrs. Finch, and were properly excluded by the trial court. *Lake v. Tyree*, 90 Va. 719, 721-2, 19 S. E. 787, and authorities cited. Mrs. Finch was, of course, bound by the representations of her husband, her agent, in negotiating the lease. *Crump v. Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116.

It appears that he did represent that his wife was the owner of the whole lot, and that this statement was not true; but it does not appear that he knew that it was false, or that the statement was made with fraudulent intent. Indeed, the evidence tends to prove that it was some months after the lease was made before the Old Dominion Land Company discovered that it had any interest in, or asserted claim to, any part of the leased premises. The defect in the title is so small, being less than 1-460 part of a lot 25 x 95 feet, and of such a character that it is much more reasonable to attribute the representation of the agent, under the facts and circumstances disclosed by the record, to a mistake than to a fraudulent purpose.

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But, even though the representation be innocently made, it still may be good ground for rescission. *Grim. v. Byrd*, 32 Gratt. 293.

While mistake, as well as fraud, furnishes ground for rescinding contracts, an executed contract will not be rescinded in either case unless the fraud be satisfactorily established or the mistake be plain and palpable and affect the very substance of the thing contracted for. *Thompson v. Jackson*, 3 Rand. 504, 15 Am. Dec. 721; *Glassel v. Thomas*, 3 Leigh 113; *Leas' Ex'or v. Eidson*, 9 Gratt. 278-9; *Rogers v. Pattie*, 96 Va., 498, 31 S. E. 807.

It may well be doubted whether the defect in the title to the very small parcel of land claimed by the Old Dominion Land Company, affected the very substance of the thing contracted for, or would have prevented the lessees from erecting substantially the same size building they desired to erect if it had been lost to them; yet, if it be conceded that in this case the lot was leased for a particular size building and that the loss of the small triangle would have defeated that purpose, and therefore affected the very substance of the lease, under the facts of the case, we do not think the lease should be rescinded. By the terms of the lease, the lessees were bound to erect the building provided for by the lease within six months from the date of the lease. The defect in the title was not discovered until after that time had expired, yet nothing had been done towards erecting the building except getting up plans for it; which shows that the lessees were in no great hurry to erect the building. It does not appear that they gave notice to Mrs. Finch of such defect until they instituted their suit for rescission, which was more than eighteen months after they had discovered it, and more than a year after her separation from her husband. Notice to the husband of the lessor of the defect in the title and of the lessees' desire or intention to rescind was not notice to the lessor. She had executed the lease in person, and while her husband had united with her in signing the lease,

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it shows upon its face that she was the lessor. The authority that the husband had to act for her, was, by virtue of the power of attorney of record, and that did not authorize him to make contracts for leases of longer duration than ten years; and, of course, gave him no authority to agree to a rescission of a lease which he had no authority to make.

It is well settled that a party dealing with an agent acting under the written authority, must take notice of the extent and limits of that authority. *Steinback v. Read, &c.*, 11 Gratt. 281, 286; 62 Am. Dec. 648.

It appears that immediately after the lessor was notified of the Old Dominion Land Company's claim, that interest was contracted for or acquired by her counsel for her benefit so as to fully protect the lessees in their rights, and the lessees notified of that fact.

Under the facts and circumstances disclosed by the record, we are of opinion that the trial court erred in rescinding the lease, that its decree must be reversed, and this court will enter such decree as that court ought to have entered, dismissing the bill.

*Reversed.*

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Syllabus.

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**Wytheville.****WALLEN v. WALLEN AND OTHERS.**

June 13, 1907.

Absent, Cardwell, J.

1. **APPEAL AND ERROR—Final Judgment—Exception to Ruling of Trial Court.**—An order, refusing to admit to probate a paper offered as a will, is a final judgment to which a writ of error lies, although no provision is made for the costs of the proceeding in which the will is offered; and an exception to the action of the court, refusing to set aside the verdict of the jury and grant a new trial of the issue as to whether or not the paper offered was the true last will and testament of the testator, is sufficient to enable the propounder of the paper to maintain a writ of error, although no formal exception was taken to the judgment of the court refusing to admit the paper to probate.
2. **APPEAL AND ERROR—Harmless Error—Bill of Particulars.**—The refusal of the trial court to require a defendant to file a statement of his grounds of defense is not assignable error here, where it appears that the defenses relied on were distinctly developed at the trial, the greatest latitude allowed the parties, and that the plaintiff could not have suffered any injury by the refusal of the court to require such statement to be filed.
3. **EVIDENCE—Relevancy—Wills—Probate.**—On a motion to admit a will to probate, where the only issue is undue influence, the propounder cannot be asked if she wants to hold on to all of the property of the testator, to the exclusion of his children. The evidence is irrelevant to the issue, or to the due execution of the will.
4. **WILLS—Undue Influence—Devise to Wife—Pecuniary Condition of Children—Evidence.**—Upon issues of testamentary incapacity and of undue influence exerted by a wife over her husband in making a will of all of his property to her, to the exclusion of his children, evidence that his children were poor and in needy circumstances is

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relevant, and may be considered as a circumstance in determining the validity of the testamentary disposition of his property.

5. **WITNESSES—Impeachment—Questions Tending Merely to Degrade Witness.**—A witness cannot be asked a question which merely tends to degrade him, and thereby affect his credibility, if the question is otherwise irrelevant.
6. **WILLS—Testamentary Capacity—Burden of Proof—Presumption of Sanity.**—The burden of proving testamentary capacity is on the propounder of a will, but when a will is offered for probate and it is shown that all the statutory formalities have been complied with, and especially where it appears that the will is wholly in the handwriting of, and is signed by the testator, there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced.
7. **EVIDENCE—Fraud—Undue Influence—Burden of Proof—Shifting of Burden.**—Fraud is never presumed, but must always be proved by the party alleging it. This burden never shifts; and while it is necessary for the propounder of a will, the probate of which is resisted on the ground of undue influence, to bring forward evidence to repel evidence of undue influence which has been offered by the other side, the real burden of proof upon the issue of undue influence has not changed, and it is misleading and erroneous, after having instructed the jury correctly on the subject, to further instruct them that "the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will and testament of a free and capable testator."
8. **APPEAL AND ERROR—Instructions—Objections not made in Trial Court.**—This court cannot consider an objection to an instruction given by the trial court, when the objection was not saved by proper exception. The objection cannot be made in this court for the first time.
9. **WILLS—Testamentary Capacity—Undue Influence—Nature and Character of Will—Evidence.**—The nature and character of a will may be considered as a circumstance along with all the other circumstances affecting the testamentary capacity of a testator and the question of undue influence, but cannot of itself be sufficient to establish the want of testamentary capacity, or that the testator, in the execution of his will, was controlled by undue influence.
10. **WILLS—What Constitutes Undue Influence.**—The influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was

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obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.

11. *WILLS—Testamentary Capacity—Undue Influence—Evidence—Declarations of Testator.*—Upon issues of testamentary capacity and undue influence, the declarations of the testator not made contemporaneously with the execution of his will, are relevant evidence to show his feelings and affections towards the natural objects of his bounty, his mental condition as reflecting upon his testamentary capacity; but are not admissible to establish the substantive fact of undue influence.
12. *INSTRUCTIONS—Needless Multiplication.*—As every instruction unnecessarily given increases the chances of a reversal, the multiplication of instructions should be avoided as far as possible.

Error to a judgment of the Chancery Court of the city of Richmond on a motion to admit a will to probate. Judgment for the defendants. Plaintiff assigns error.

*Reversed.*

The ruling of the trial court will best appear from plaintiff's bill of exception No. 8, which is in the following words and figures, to-wit:

"Be it remembered that at the trial of the issue in this case the plaintiff, Alice H. Wallen, moved the court to instruct the jury as follows:

A.

"The court instructs the jury that every person over twenty-one years of age and of sound mind is entitled under the law to make a will, and to dispose of his property as he pleases, and to discriminate against or between his next of kin as he may choose."

B.

"The court instructs the jury that if they believe from the evidence (1) that the paper writing offered in evidence was wholly written by the decedent, James A. Wallen, and signed

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by him; and (2) that at the time of its execution, said decedent was of sound mind and over twenty-one years of age, and that he knew the contents thereof and understood it to be his last will and testament, then they must find that said paper writing is, in all its parts, the true last will and testament of said decedent, unless they shall further believe from the evidence that he was unduly influenced (as explained in instructions to follow) to execute the same, in which event, they must find that such writing is not such true last will and testament."

## C.

"(a) The court instructs the jury that the burden of proving that James A. Wallen was of sound mind at the time of the execution of the paper writing herein offered as his last will and testament, rests upon the propounder, Alice H. Wallen; and that it is incumbent upon her to establish that fact by a preponderance of testimony.

(b) The court instructs the jury that undue influence, which is a species of fraud, must not be presumed, but must be clearly and strictly proved; and that the burden of such proof rests upon the contestants, J. H. Wallen and others; and that it is incumbent upon them to establish undue influence by a preponderance of testimony."

## D.

"The court instructs the jury that every person who is capable of recollecting the property he is disposing of, the manner of disposing of it, and the natural objects of his bounty, is of sound mind."

## E.

"The court instructs the jury that the influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another; that would be a very strong ground in favor

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of the testamentary act. Further, there must be proof that the act was obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."

## F.

"The court instructs the jury, that neither the facts of sickness, old age, eccentricities, imperfect memory nor impaired intellect, if they believe from the evidence that any or all of them existed in this case, are sufficient of themselves to prove that the decedent, James A. Wallen, was of unsound mind within the meaning of the second instruction above; but any or all of these facts, if they existed, may be considered by the jury in determining the question of the soundness of his mind."

## G.

"The court instructs the jury that there is no presumption of undue influence having been exercised by a wife upon her husband merely on account of the relationship existing between the parties; and, further, that solicitations, persuasions and urgings by a wife to secure an advantage in a will, though successful, do not give rise to the presumption of undue influence where the evidence does not show by a preponderance thereof that the free agency of the husband was, by means of such solicitations, persuasions and urgings, destroyed; nor does the fact that the wife received the whole of the estate to the exclusion of the other heirs raise a presumption against the validity of the will."

## H.

"The court instructs the jury that, while declarations of a testator not contemporaneously made with the execution of a will are relevant evidence to show the feeling or affection of a testator towards the natural beneficiaries of his bounty, yet



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they are not admissible to establish the substantive fact of undue influence."

## I.

"The court instructs the jury that the circumstance that the writing exhibited for probate in this case as the last will and testament of James A. Wallen was wholly written by him may be considered by them as evidence that he was in his senses and able to make a will at the time the writing was made."

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"The court instructs the jury that in order to declare the paper writing offered in evidence as the last will and testament of James A. Wallen invalid, on account of undue influence, it is not sufficient to find that such evidence shows that there was influence which affected the testator in the disposition of his property; but in order to render such evidence sufficient to find against the will, it must show that the influence claimed to be undue dominated his will, at the time he was making the disposition of his property, or took away his free agency and prevented the exercise of judgment and choice by him."

"And the defendants, James A. Wallen *et als.* moved the court to instruct the jury as set forth in instructions Nos. 13 to 30, both inclusive, hereinafter set forth, and which were given by the court. •

"And thereupon the court instructed the jury in the words and figures following:

"(1) The court instructs the jury that every person over twenty-one years of age, and possessing testamentary capacity, is entitled under the law to make a will and to dispose of his property as he pleases and to discriminate against or between his next of kin as he may choose."

"(2) The court instructs the jury that every person is of testamentary capacity who is capable of knowing and understanding the nature of the instrument he is engaged in pre-

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paring, the elements of which the will is composed, and the disposition of the property as therein provided for, both as to the property he means to dispose of by will, and the persons to whom he means to give it; and the manner in which it is to be distributed amongst them."

"(3) The court instructs the jury that neither sickness, old age, imperfect memory, nor impaired intellect, even if the jury believe from the evidence that any or all of them existed in the decedent, James A. Wallen, at the date the paper here propounded for probate was written, are sufficient to render void the said paper; if the jury also believe from the evidence that the said decedent, at the time the said paper was written, was capable of understanding the nature of the instrument he was engaged in preparing, and of recollecting what property he was about to dispose of, the manner of disposing of it, and the objects of his bounty, they must find that he had legal capacity to make a valid disposition of his property."

"(4) The court instructs the jury that if they believe from the evidence that the paper writing here propounded as the last will and testament of James A. Wallen, was wholly written by him and signed by him in such manner as to make it manifest that the name of said James A. Wallen was intended as his signature thereto, and that at the time of its execution he was over twenty-one years of age, and of testamentary capacity, and that he knew and understood the contents thereof, and knew it to be his last will and testament, then they must find that said paper writing is, in all its parts, the true last will and testament of said decedent; unless they shall further believe from the evidence that he was unduly influenced (as explained in instructions to follow) to execute the same, in which event they must find that said writing is not his true last will and testament."

"(5) The court instructs the jury that the burden of proving the testamentary capacity of the said decedent, James A. Wallen, at the time of the execution of the said paper writing, rests

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upon the propounder, Alice H. Wallen, and that it is incumbent upon her to establish this fact to their satisfaction by clear proof."

"(6) The court instructs the jury that to make a good will the testator must be a free agent, but all influences are not unlawful; appeals to affection, or ties of kindred, to gratitude for past services, or pity for future destitution, or the like, are all legitimate, and may be fairly urged on the testator. On the other hand, pressure of whatever character, if so exerted as to overpower the volition, without convincing the judgment, is a species of constraint, under which no valid will can be made. Impunity which the testator has not the will or the strength to resist, and to which he yields for the sake of peace and quiet, if carried to a degree in which the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is used. In other words, the testator's will must be the offspring of his own volition and not the record of the wishes and desires of some one else; and in determining whether the testator's free volition has been overborne or controlled, the jury must consider his age, his mental and physical condition and all the circumstances surrounding the testator at the time the will was executed; and should the jury believe from the evidence that the paper here propounded for probate was the product of undue influence, their verdict must be against it."

"(7) The court further instructs the jury that undue influence (which is a species of fraud) must not be presumed, but must be clearly and strictly proved, and the burden of proving it rests upon those who allege it; but, if undue influence is proved by evidence, the burden of repelling such undue influence is on the propounder, Alice H. Wallen; in other words, the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will of a free and capable testator."

"(8) The court instructs the jury that no presumption of

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undue influence having been exercised by a wife upon her husband in the making of his will arises merely on account of the marriage relationship existing between them; and further, that persuadings and urgings by a wife to secure an advantage in a will, though successful, do not give rise to the presumption of undue influence, where the evidence does not show by a preponderance thereof, that the free agency and volition of the husband was by means of such persuadings and urgings overborne or controlled; nor does the mere fact that the wife received the whole of the estate, to the exclusion of the other heirs, raise a presumption against the validity of the will."

"(9) The court instructs the jury that declarations of a testator whether made contemporaneously with or prior to the execution of a will, are relevant evidence to show the feelings or affection of a testator toward the natural beneficiaries of his bounty, and that such declarations may be taken into consideration by them, along with other facts and circumstances of the case, in determining whether, under influence, was or was not used upon the testator in the making of his will, and they may give the same such weight as, in their sound discretion and judgment, they may be entitled to."

"(10) The court instructs the jury that, if they believe from the evidence that the paper writing here propounded as the last will and testament of the decedent, James A. Wallen, was wholly written and signed by him, they may consider such fact as tending to prove that he was in his senses and able to make a valid will at the time the said writing was made."

"(11) The court instructs the jury that every person who is capable of recollecting the property he is disposing of, the manner of disposing of it, and the natural objects of his bounty, is of sound mind."

"(12) The court instructs the jury that in order to declare the paper writing offered in evidence as the last will and testament of James A. Wallen invalid, on account of undue influence, it is not sufficient to find that such evidence shows that

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there was influence which affected the testator in the disposition of his property, but in order to render such evidence sufficient to find against the will, it must show that the influence claimed to be undue dominated his will, at the time he was making the disposition of his property, or took away his free agency and prevented the exercise of judgment and choice by him."

"(13) It is the duty of Alice H. Wallen to establish to the satisfaction of the jury, not only that the will in question was executed with the formalities required by law, but also that, at the time that it was executed, James A. Wallen was of sound and disposing mind and memory—not only that the instrument was wholly in the handwriting of the testator and signed by the said James A. Wallen in such manner as to make it manifest that the name of said James A. Wallen was intended as his signature thereto, but also that it was executed by one who understood its contents and was capable of being a testator and by one to whom the law had given the right of making a disposition of property by will. And otherwise, the verdict must be against the will."

"(14) The will cannot be sustained unless the jury believe from the evidence that the testator at the time of its execution understood its contents, and had sufficient mind and memory to be capable of making a testamentary disposition of his property with sense and judgment in reference to the situation and amount of such property, and the relative claims of the different persons who are, or might be, the objects of his bounty. Unless the testator thus understood, and was capable, the verdict must be against the will, even though the jury may believe from the evidence that he was capable of understanding and conducting other transactions."

"(15) Direct proof is not necessary to overthrow a will, but any facts and circumstances are sufficient as evidence that satisfy the jury of the incapacity of the testator to make a testamentary disposition of his property at the time of the execution of the will."

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"(16) The jury must consider the nature and character of the will, and if they find from the evidence that it is contrary to natural justice, they shall give this fact such consideration as they may deem proper in determining the question of the testator's capacity."

"(17) In determining the question of the testator's capacity, the jury are at liberty to consider whether the claims of near relationship have been disregarded; and if they find from the will and evidence that such claims have been disregarded, they may consider that fact in connection with other facts and circumstances of the case, and give it such weight as, in their sound judgment and discretion, they shall think it entitled to."

"(18) It is essential to the making of a valid will that the testator shall, at the time of its execution, be of disposing mind and memory. Failure of memory, if the jury find it to have existed, may be considered in connection with all other facts and circumstances of the case in determining the testator's capacity, and shall have such weight as the jury, in the exercise of their sound judgment and discretion, may think it entitled to."

"(19) It is essential to the exercise of the power to make a will that the person making it be able to comprehend and appreciate his relations to others who might, or ought to be, the objects of his bounty, and that no disorder of the mind shall have so far impaired the mind or poisoned his affections, perverted his sense of right, or prevented the exercise of his natural faculties as to render him incapable of such comprehension and appreciation, and bring about a disposal of his property, which, if his mind had been otherwise, would not have been made."

"(20) While undue influence which operates to defeat a will must be such as to overcome the free action of the mind at the time of the execution thereof, yet it is also true that the pressure may sometimes have been brought previously. If pressure constituting undue influence has been brought previously, and

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remains so as to unduly influence the mind of the testator at the time of the execution of the will, the will cannot be upheld."

"(21) Proof of undue influence must, in most instances, be made out, if at all, by proof of facts and circumstances. Such facts and circumstances, standing alone, may be trivial, but when taken together are sufficient, if they satisfy the jury that the will was procured by undue influence."

"(22) The court instructs the jury that if they believe from the evidence that the paper writing here propounded for probate differs materially in its provisions from the previously expressed intentions of the decedent, and that, at the time of the execution of the said paper, he was an old man, and that he was materially impaired both in body and mind, and that the beneficiary of the said paper here propounded is his wife, and that she exercised dominion and control over his mind, so as to destroy his free agency, and that she unduly exercised such influence over him, these facts, if such they be, raise a presumption of undue influence which she, as the propounder of said paper, should overcome by satisfactory evidence."

"(23) While a person is not to be regarded of unsound mind simply because the provisions of his will may be unjust, yet if the jury, from the will and the evidence, find them to be unjust, in view of the claims that his children may have had upon him, the jury have a right to consider this fact in connection with the other facts and circumstances of the case in determining whether or not the testator was of unsound mind."

"(24). The amount of undue influence sufficient to invalidate a will may vary with the strength or weakness of mind of the person making it. The influence which would not subdue or control a mind unimpaired by age, disease or other cause, might subdue or control a mind thus impaired, even though the mind had not become so impaired as to render the person incapable of a testamentary act, free from such undue influence."

"(25) The question as to what is undue influence depends largely upon the circumstances of each case, chief of which are

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the dispositions contained in the will, the situation of the person making it, the mental and physical condition at the time of making it. And if the jury shall believe from the evidence that influence which the testator was incapable of resisting was successfully employed to induce the testator to make an unequal disposition of his property, or disregard the ties of blood without sufficient cause, it should be viewed as illegitimate, and treated as undue, and if the jury entertain such belief, they shall find against the will."

"(26) The jury in determining whether there was undue influence must consider the age and the physical and mental conditions of the testator, all the circumstances by which he was surrounded, including the condition, character and conduct of the persons around him, and his family relations, the extent and nature of his estate, and the dispositions of the will."

"(27) Even though the jury believe from the evidence that the testator was mentally capable of making a will, yet in determining whether the will in question was procured by undue influence, the jury must consider any evidence showing, or tending to show, that at the time of the execution of the will his faculties had become so weakened by age, disease or other cause, as to render him more subject to undue influence than he otherwise would have been."

"(28) The court instructs the jury that if they shall believe from the evidence that the said paper writing was procured by undue influence exercised upon the mind of the testator by any one, they shall find against the will."

"(29) Even though the jury may believe that the testator was mentally capable of executing a will, yet, in determining the question of undue influence, they should consider any evidence showing or tending to show that his mind was weakened or perverted so as to render him more subject to undue influence than he otherwise would have been."

"(30) If the jury believe from the evidence that the proponent of the paper, Alice H. Wallen, used means to prevent



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the children of James A. Wallen from seeing him, except in the presence of the said Alice H. Wallen, or her sister, or a friend selected by the said Alice H. Wallen, the jury may consider that fact, in connection with other facts and circumstances, and give it such weight as, in their sound judgment and discretion, they shall think it entitled to in determining whether or not the said paper was the product of the said James A. Wallen's own volition."

To which action of the court, in refusing to give Instruction "C.," and in giving in lieu thereof Nos. 5 and 7, as a substitute therefor, the plaintiff objected, and also objected to the action of the court in refusing to give Instructions "E." and "H.," propounded by her, on the ground that said Instructions "C.," "E." and "H." correctly propounded the law of the case, and objected to the giving of Instructions Nos. 5, 6, 7, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, on the grounds that said instructions were contrary to the law of the case, as applicable to the evidence of the case, all of which is certified in Bill of Exceptions No. 9, contradictory of other instructions given by the court, which correctly propounded the law of the case, were misleading, and so numerous as to be confusing; but the court refused to give said Instructions "C.," "E.," and "H.," and likewise overruled said objection to said Instructions Nos. 5, 6, 7, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, to which action of the court the plaintiff excepted and now files this, her bill of exceptions, which she prays may be signed, sealed, enrolled and made a part of the record."

After the jury had found that the paper offered was not the true last will and testament of the testator, the propounder of the will moved the court to set aside the verdict of the jury and grant her a new trial of the issue upon the ground (1) that the said verdict is contrary to the law and the evidence, and (2) that the court had misdirected the jury. Thereupon, the record states:

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"And the court having heard the argument of counsel, doth overrule said motion, and doth refuse to set aside the said verdict.

"And the court, approving the said verdict, doth confirm the same, and doth adjudge, order and decree that the said paper writing, bearing date January 16th, 1904, offered for probate as the last will and testament of James A. Wallen, deceased, is not, nor is any part thereof, the true last will and testament of the said James A. Wallen, deceased; and the court doth refuse to admit to probate the said paper writing, or any part thereof, as the true last will and testament of the said James A. Wallen, deceased.

"The propounder of said paper writing, Alice H. Wallen, having signified her desire to appeal from this order, thirty days' time is given her to present to the court her bills of exception taken during the trial of said issue."

The evidence referred to in bills of exception Nos. 3, 4, 5 and 6 was the testimony of different children of the testator to the effect that they were severally very poor and owned no property.

*Henry B. and Robt. N. Pollard and Leake & Carter*, for the plaintiff in error.

*A. L. Holladay, Wm. L. Royall and C. W. Throckmorton*, for the defendants in error.

KEITH, P., delivered the opinion of the Court.

A jury was empaneled in the Chancery Court of the city of Richmond, to determine whether or not a certain paper writing, purporting to be the last will and testament of James A. Wallen, deceased, be the true last will and testament of said James A. Wallen. The jury found that the paper writing, bearing date the 16th day of January, 1904, and offered for

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probate as the last will and testament of James A. Wallen, deceased, is not the true last will and testament of the said James A. Wallen. Thereupon Alice H. Wallen moved the court to set aside the verdict and grant her a new trial, (1) because the verdict was contrary to the law and the evidence; and (2) because of misdirection of the jury. But the court approved the verdict, confirmed the same, and entered an order in accordance with it. And thereupon the case was brought before us upon bills of exception taken during the trial.

The defendants in error moved to dismiss the appeal for want of jurisdiction, because—

“First: No final order has been made by the lower court;

“Second: The plaintiff in error did not in terms except to the action of the lower court in refusing to grant a new trial. Her exception to the refusal of the court to set aside the verdict of the jury was insufficient;

“Third: The plaintiff in error did not except to the judgment of the lower court, refusing to admit to probate the paper writing offered by her.”

None of these grounds are sufficient to sustain the motion to dismiss, and we do not think them of sufficient consequence to warrant an extended discussion. We are of opinion that the decision of the lower court was final, though it did not make provision for the costs of the suit; and that the exception taken by the plaintiff in error was sufficient to enable her to maintain her writ of error. The motion to dismiss is overruled.

The first error assigned in the petition is to the refusal of the court to require the defendants, before going to trial of the issue, to file a statement of the grounds of their defense, as requested by plaintiff in error.

Without undertaking to state categorically the cases to which the statute relied on does or does not apply, and granting that there might be conditions on a motion to admit a paper to probate, where the court would require a statement of the grounds relied upon by those opposing the probate, we shall content

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ourselves with observing that in this case the plaintiff in error could have suffered no injury by the refusal of the court. The defendants relied, in general, upon want of testamentary capacity on the part of James A. Wallen, and undue influence exerted upon him in procuring the execution of the paper offered for probate, and to meet these issues, the greatest latitude was allowed the parties interested on both sides of the question.

The second error assigned is set out in plaintiff in error's first bill of exception. Alice H. Wallen, the propounder of the will and the beneficiary under it, was introduced as a witness on her own behalf, and, upon cross-examination, was asked by counsel for defendants in error the following questions: "Do you want to hold on to every particle of property that Mr. Wallen had, and prevent his children from getting a single dollar?" A. "I would like very much if they have anything to have the privilege of giving it to them. I don't want it wrung out of me against Mr. Wallen's will." Q. "Then, I understand that you want to hold on to all of his property if you possibly can?" A. "I think the papers ought to stand as they are." To each of these questions and the answers thereto, plaintiff, by counsel, objected, on the ground that they were irrelevant to the issue; but the court overruled the objection and allowed answers to be given.

In this we think there was error to the prejudice of plaintiff in error. The evidence did not bear upon any phase of the issues before the jury. It was not relevant to the execution of the paper offered for probate, nor to the issue of undue influence by which it was alleged that its execution had been procured. Its sole effect could have been to prejudice the witness in the opinion of the jury.

The third assignment of error is as to the admission in evidence of declarations of the testator not cotemporaneous with the execution of the will. We prefer to deal with this subject when we come to the consideration of the instructions given and refused.

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The third, fourth, fifth and sixth bills of exception are to the admission of evidence with respect to the pecuniary condition of certain of the defendants.

We think the evidence admissible. A testator might, with great propriety, omit a child from participation in his bounty upon the ground that his pecuniary condition was such as to render any addition to his wealth unnecessary; and while we do not mean to say that a testator may not, with entire propriety, omit a child from participation in his bounty who is in need of assistance, we think the fact is one which may be rightfully considered as a circumstance in determining the validity of the testamentary disposition of property.

The fifth assignment of error is with respect to the testimony of a witness, Gustavus A. Paul, whose wife was a sister of the propounder of the will, and had been examined as a witness in behalf of the will. Counsel for contestants were permitted to show by this witness that he had been divorced from his wife on the ground of her wilful desertion. This tended to degrade her, and thereby to affect her credibility, and was not a proper mode of impeaching her as a witness. See *Uhl v. Com'th*, 6 Gratt. 706.

At the conclusion of the evidence, the plaintiff asked the court to give the jury certain instructions, marked "A" to "J," inclusive, and the defendants asked for instructions marked 13 to 30, both inclusive; and thereupon the court refused to give instructions marked "C," "E" and "H," and gave to the jury of its own motion, instructions 1 to 12 inclusive, and those offered by defendants marked 13 to 30, inclusive; whereupon plaintiff in error excepted to the refusal of the court to give instructions "C," "E" and "H" and to the giving by the court, of its own motion and at the request of defendants in error, of instructions marked 5, 6, 7, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29 and 30.

Instruction C, asked for by plaintiff in error, and refused by the court, is as follows: "(a) The court instructs the jury that

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the burden of proving that James A. Wallen was of sound mind at the time of the execution of the paper writing herein offered as his last will and testament, rests upon the propounder, Alice H. Wallen; and that it is incumbent upon her to establish that fact by a preponderance of testimony. (b) The court instructs the jury that undue influence, which is a species of fraud, must not be presumed, but must be clearly and strictly proved; and that the burden of such proof rests upon the contestants, J. H. Wallen and others; and that it is incumbent upon them to establish undue influence by a preponderance of testimony."

In lieu of the first branch of this instruction, the court gave instruction No. 5, which is as follows: "The court instructs the jury that the burden of proving the testamentary capacity of the said decedent, James A. Wallen, at the time of the execution of the said paper writing, rests upon the propounder, Alice H. Wallen, and that it is incumbent upon her to establish this fact to their satisfaction by clear proof." And the second clause of the instruction of plaintiff in error was met by the court by giving instruction No. 7: "The court further instructs the jury that undue influence (which is a species of fraud) must not be presumed, but must be clearly and strictly proved, and the burden of proving it rests upon those who allege it; but, if undue influence is proved by evidence, the burden of repelling such undue influence is on the propounder, Alice H. Wallen; in other words, the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will of a free and capable testator."

The first clause of the instruction asked for by plaintiff in error was sufficiently liberal to the defendants. It is true that the propounders of a will have the burden placed upon them of proving the testamentary capacity of the decedent; but when a paper writing is offered to a probate court, and it is shown that the formalities required by the statute in such case made and provided have been complied with, and especially where it appears that the paper is wholly in the handwriting of and signed

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by the testator—is in form an holograph will—there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced; and this presumption applies in all cases, criminal as well as civil.

So it was held in *Temple v. Temple*, 1 Hen. & Munf. 476, a case decided just one hundred years ago and never since questioned, that “The circumstance that a writing, exhibited for probate as a last will and testament, was wholly written by the testator himself, is *prima facie* evidence that he was in his senses and able to make a will at the time of writing the same; so that the *onus probandi* to repel that presumption lies on those who wish to impugn it;” and “proof that the testator’s intellects were greatly impaired by the use of opium and ardent spirits, and that, in consequence thereof, he was frequently incapable of business, is not sufficient to repel the presumption without proof that such was his condition at the time when the writing was executed.”

It is axiomatic in law, and nowhere more firmly held than with us, that fraud, wheresoever and by whomsoever relied upon, is never presumed, but must be clearly proved; and this principle is correctly stated in the first part of instruction 7. It is followed up, however, by the statement that “if undue influence is proved by evidence, the burden of repelling such undue influence is on the propounder.” If the defendants had introduced evidence sufficient to establish undue influence and no evidence had been introduced to the contrary, the verdict must have been against the will. But that is a very different thing from the burden of proof. That burden is always upon him who alleges fraud. In the case supposed, that burden would have been met and sustained, and to conclude that instruction with the statement that “the burden of proof in this case lies upon said propounder, to satisfy the jury by evidence that the paper writing propounded is the last will of a free and capable testator,” makes the instruction, taken as a whole, misleading

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and erroneous, because it leaves upon the propounder the burden of disproving the exercise of undue influence in procuring the execution of the will.

We are of opinion that the court should have given instruction C in both of its branches as asked for by plaintiff in error, and that, as applied to the facts of this case, it presents the law in terms as favorable as contestants could have expected.

There was, perhaps, no occasion to give instruction 26, as the proposition presented in it is sufficiently covered by other instructions; but it is not embraced in the bills of exception, and the objection to it made in the petition cannot be considered.

Instruction 16 is to the following effect: "The jury must consider the nature and character of the will, and if they find from the evidence that it is contrary to natural justice, they shall give this fact such consideration as they may deem proper in determining the question of the testator's capacity." In other words, if the jury should be of opinion that natural justice required that the testator should not have made his wife the sole legatee, but that his children should have participated in the distribution of the estate, they were at liberty, for that cause alone, to declare the testator wanting in testamentary capacity and to hold his last will and testament a nullity; which would be to say that the jury were at liberty to make a will in accordance with their ideas of natural justice.

The nature and character of a will may be considered as a circumstance, along with all other circumstances, affecting the testamentary capacity of the testator and the question of undue influence, but cannot of itself be sufficient to establish the want of testamentary capacity, or that the testator, in the execution of his will, was controlled by undue influence. The instruction, indeed, is plainly at war with other instructions given to the jury. (See instructions G and J, among others.)

What has been said with reference to instruction 16 applies also to instruction 30.

Instruction E, asked for by plaintiff in error and refused by



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the court, is as follows: "The court instructs the jury that the influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another; that would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace so that the motive was tantamount to force and fear."

That instruction is supported by 1 Williams on Ex'ors, p. 39, and 1 Johns on Wills, p. 29, was approved in *Parramore v. Taylor*, 11 Gratt. 220, 239, a case of the highest authority, and it was error to refuse it.

This brings us to the consideration of instruction H, which was refused by the court. The court was asked to instruct the jury, "That while declarations of a testator not contemporaneously made with the execution of a will, are relevant evidence to show the feeling or affection of a testator towards the natural beneficiaries of his bounty, yet they are not admissible to establish the substantive fact of undue influence."

This presents for consideration an interesting question, which may affect several other instructions given, and we shall endeavor to state our views so as to settle the law upon the subject without referring to each particular instruction, and thus prolonging an already lengthy opinion.

The declarations of a testator, although not made contemporaneously with the execution of the will, are admissible, not only as showing his feeling or affection towards the natural beneficiaries of his bounty, as stated in the instruction, but are also relevant to show his mental condition with respect to his testamentary capacity; but are not admissible to establish the substantive fact of undue influence.

In 29 Am. & Eng. Ency. L., 117, it is stated that "Declarations of a testator, contemporaneous with the execution of the will, are admissible as part of the *res gestae* for the purpose of

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showing the existence of undue influence. But declarations of a testator not contemporaneous with the execution of the will are generally held not admissible to establish the substantive fact of undue influence, since they are mere hearsay evidence, which, by reason of the death of the testator, can never be explained or contradicted by him."

In *Jackson v. Kniffin*, 2 Johnson (N. Y.) 33, 3 Am. Dec. 390, the opinion delivered by Judge Thompson, and concurred in by Chief Justice Kent and Justice Livingston, says: "This will might have been executed under circumstances which ought to invalidate it, but to allow it to be impeached by parol declarations of the testator himself, would, in my judgment, be eluding the statute, and an infringement upon well settled and established principles of law." And Judge Livingston, delivering a separate opinion, uses the following language: "I concur in the opinion just delivered, though, on the first reading of this case, my impressions were, that the testator's declarations, made in the moment of expected dissolution, should have been received, to establish the duress under which he acted. On more mature reflection, I am satisfied that they were properly rejected. Besides the danger of tampering with a person who may be known to have made his will; of fraud, in making use of some loose and unguarded expression to set it aside; and of perjury, in fabricating declarations, which may never have been made, and thus revoking a will by parol, the right of cross-examination is invaluable, and not to be broken in upon."

In *Stevens v. Vancleve*, 4 Wash. (U. S. C. C.) 262, Mr. Justice Washington states the law as follows: "The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity. If the evidence is offered in support of the instrument, it could only have that effect upon the supposition of a uniform consistency of those declarations, not only

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with the instrument itself, but with the secret intentions of the party, at all times after those declarations were made; and yet how unsafe a criterion would this be, when most men will acknowledge the frequent changes of their intentions respecting the disposition of their property by will, before they have committed them to writing. The uniform consistency of those declarations is the chief ground upon which the whole argument in favor of the evidence is rested; and yet, if the evidence be admitted at all, the plaintiffs would be at full liberty to prove opposing declarations of the testator at other times; and thus a door would be open to an inquiry in no respect pertinent to the main subject of investigation, but mischievously calculated to perplex and to mislead the jury. That such evidence has sometimes been given, is proved by many of the cases read by the defendant's counsel; but it would be very unsafe to consider those instances as laying down a rule of law, since, in none of them, was an objection made to the admission of the evidence, so as to submit its competency to judicial inquiry and decisions. The general rule of law is against the evidence, and no case has been cited showing an exception to it, unless, when it was offered to repel a charge of fraud or circumvention of the devisee in obtaining the will."

In *Waterman v. Whitney*, 11 N. Y. (1 Kernan) 157, 62 Am. Dec. 71, the syllabus states that where the will is resisted on the ground that the testator was not of sound mind, or that it was procured by undue influence which involves his mental condition at the time it was executed, his subsequent statements, touching the disposition of his property and inconsistent with the will, in connection with other evidence tending to prove a want of mental capacity, are competent; that on these issues his declarations, made before the will was executed, are evidence under the same restrictions and for the same purpose; that such prior or subsequent declarations are competent evidence on these questions, only as tending to prove the testator's mental condition when the will was executed; but when, from

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the remote period at which the declarations were made, or other cause, they do not legitimately bear upon the state of the testator's mind when the will was made, they should be excluded. These conclusions were reached after an examination of a great many English and American cases. The principle established seems to be that the declarations of the testator are admissible to show his mental condition or capacity, as well as his feelings or affections, but are inadmissible as proof of the substantive fact of undue influence.

The very recent case of *Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474, contains a fuller view of the authorities bearing upon the subject. The court said: "After much reflection upon the subject, we are inclined to the opinion that, not only is the weight of authority with the cases which exclude the evidence, both before and after the execution, but the principles upon which our law of evidence is founded, necessitates that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and, when no part of the *res gestae*, are not within any of the recognized exceptions, admitting evidence of that kind. Although, in some of the cases, the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases, his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But, if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

"When they are not part of the *res gestae*, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible, on the ground that they are said to indicate the condition of mind of

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the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that, for the purpose of showing delusion, it may be necessary to give evidence of their falsity), but the mere fact that they were uttered, may be most material evidence upon that issue. The declarations of a sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings, arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable, or weak and incapable, and that, from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false, cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are, in either case, unsworn declarations."

In *Shailer v. Bumstead*, 99 Mass. 112, it is said: "Intention, purpose, mental peculiarity and condition are mainly as-

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certainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are, therefore, received as mental acts or conduct. The truth or falsity of the statement is of no consequence."

In *Gibson v. Gibson*, 24 Mo. 227, it is said that declarations of the testator were admitted, when it was proposed to show the condition of the testator's mind, or to show the state of his affections, but never as a mere narrative of facts.

We are of opinion, therefore, that declarations of the testator, not made contemporaneously with the execution of his will, are relevant evidence, to show his feelings and affections towards the natural objects of his bounty, his mental condition as reflecting upon his testamentary capacity, but are not admissible to establish the substantive fact of undue influence.

There are many other instructions to which objection was taken. Some of them are unnecessary, as being merely iterations of propositions of law already sufficiently presented; some of them are objectionable, as giving undue prominence to particular facts. But we think we have said enough to indicate our view of the law.

We again call attention to what this court has said on more than one occasion, with respect to the danger of multiplying instructions. Every instruction unnecessarily given, increases the chances of reversal. Thirty instructions were given in this case, when, as it seems to us, a few elementary principles of law, thoroughly established by the decisions of this court, would have been sufficient to guide the jury to a correct conclusion.

We are of opinion that the order of the chancery court should be reversed, the verdict set aside, and the case remanded for a trial *de novo*.

*Reversed.*

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Syllabus.

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**Wytbeville.****HUNTER'S ADMINISTRATOR v. CHESAPEAKE & OHIO RAILWAY  
COMPANY.**

June 13, 1907.

1. **EMINENT DOMAIN—Just Compensation—Market Value—Loss of Profit.**—Where the whole property is taken in condemnation proceedings under constitutional and statutory provisions declaring that private property shall not be taken for a public use without just compensation, the "just compensation" contemplated is the market value of the property in view of any purpose to which it is adapted. The full and perfect equivalent for the property taken is what the law contemplates as the market value thereof. Loss of profits in a business destroyed or damaged is not an element for consideration in determining the market value of the property taken, though the profits earned in a business conducted on said property are proper to be considered in determining the market value of the property taken.
2. **EMINENT DOMAIN—Finding of Commissioners—Weight—Testimony of Commissioners.**—The finding of the commissioners in condemnation proceedings is entitled to great weight, and is not to be disturbed unless shown to be erroneous by clear proof. Great weight is attached to the view. The commissioners see the land and can judge of its value themselves, and are also thereby better enabled to apply the evidence produced before them to the subject of controversy, and to determine the weight to be given to its several parts. This rule is not to be disregarded or affected by the mere fact the evidence relied on to overthrow the finding consists in part of the testimony of the commissioners themselves, given five years after making their report, which they say was made in strict conformity to the instructions of the court. After a long lapse of time, the removal of buildings and a complete change in the condition of the property, and when recollection of the matter has become vague and uncertain, the findings of commissioners, made in pursuance of proper

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instructions from the court, as to the elements of damages to be considered, and supported by the evidence of a number of witnesses of intelligence and experience, will not be set aside as excessive, although the commissioners, aided by memoranda, furnished by one of them, state that \$5,000 of the \$22,000 allowed by them was "for taking a man's business away from him."

Error to a judgment of the Hustings Court of the city of Richmond, in a condemnation proceeding, wherein the Chesapeake & Ohio Railway Co. was the plaintiff, and C. E. Hunter's Administrator and heirs were the defendants. To a judgment allowing the defendants less damages than were reported in their favor by the commissioners, Hunter's Administrator assigns error.

*Reversed.*

The trial court incorporated in its order of May 7, 1900, the following instructions, to-wit:

"The commissioners, acting under this order, are to inquire and ascertain what is just compensation to the owner of the property, C. E. Hunter, that is to say, its fair cash market value, and in making up their award, they are to consider:

"(1) The fact that this is an old and established place of business, where a large and profitable business was transacted for more than half a century.

"(2) They are to consider that this building was erected, and is adapted especially for the purposes for which it is used.

"(3) That this stand is so arranged as to give peculiar facilities for receiving and handling heavy machinery and agricultural implements, owing to the peculiar formation of the alley.

"(4) They are to consider the nearness to railroad depots and wharves.

"(5) They are to consider the expense of moving the large stock of goods carried by Mr. Hunter.

"(6) They are to consider that Mr. Hunter is entitled to just



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compensation for his property. He is entitled to its full equivalent, and the value of the property in this case should be determined by its productiveness, the profit which its use brings to the owner; but the Commissioners are not to consider the profits of the business conducted by the defendant, except in so far as they go toward showing that the defendant carried on a large and lucrative business.

“(7) They are to consider the adaptability of this property for railroad purposes, having reference to the topography of the city and any other use to which this property is plainly adapted.”

“The following is a copy of instructions to guide commissioners offered by counsel for Hunter, and accepted by the court, on May 7, 1900.

“Mr. Hunter is entitled to just compensation for his property. He is entitled to its full equivalent, and the value of the property in this case should be determined by its productiveness, the profit which its use brings to the owner; but the commissioners are not to consider the profits of the business conducted by the defendant, except in so far as they go towards showing that the defendant carried on a large and lucrative business.

*A. W. Patterson and George R. Fitzhugh, for the plaintiff in error.*

*Henry C. Wickham and Henry Taylor, Jr., for the defendant in error.*

CARDWELL, J., delivered the opinion of the Court.

This writ of error is to a final judgment of the Hustings Court of the city of Richmond, in a proceeding instituted by the defendant in error, The Chesapeake and Ohio Railway Company, against plaintiff in error's intestate, C. E. Hunter

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to acquire title, by condemnation, to a certain parcel of real estate situated on Main Street, between 15th and 17th Streets, in the city of Richmond, owned by Hunter, and upon which, for many years prior, a large and profitable business had been conducted in receiving, handling and selling heavy machinery, agricultural implements, etc., the premises being peculiarly adapted, by reason of location and otherwise, to the purposes for which they had been used.

The whole of the premises being considered necessary, and therefore demanded, for the purposes of the railway company, commissioners, as provided by statute, were appointed to view the property, and, upon hearing such proper evidence as either party might offer, to report what would be a just compensation to Hunter. These commissioners filed their report on the 28th of October, 1899, ascertaining the compensation to be paid Hunter at \$15,000, but, upon exceptions taken by Hunter, the court, by its order entered April 30, 1900, set aside the award, and, by a further order, entered May 7, 1900, new commissioners were appointed, the court giving to them minute instructions, in writing, to guide them in the discharge of their duties. To the giving of these instructions, defendant in error objected, and tendered another instruction in lieu thereof, which was refused.

Three of these new commissioners acted, and filed, on the 22nd day of May, 1900, their award, ascertaining that a just compensation for Hunter, for the property in question, would be the sum of \$22,900, and stating that, as the whole of the property was required for the purposes of the defendant in error, there was no question of damages as to residue of the tract, etc. To this report, the defendant in error excepted on four grounds, stated in writing, and moved that the report be set aside.

After the filing of this report, Hunter departed this life, and his death being suggested, the court, by its order entered on the 26th day of July, 1900, made plaintiff in error, St. George

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R. Fitzhugh, administrator of Hunter, deceased, and Hunter's widow and children, parties defendant to these proceedings, and directed that they thereafter proceed in the name of these defendants.

No action was taken on the report of the commissioners bearing date May 22, 1900, until March 22, 1905, when defendant in error introduced the three commissioners, who made the report and examined them as to how they arrived at the amount awarded Hunter. They had not furnished the court any information as to how they arrived at the amount awarded, and when examined as witnesses, about five years afterwards, it appears from their testimony that, while they could not, with any degree of certainty, give the grounds of the award made, they were positive that they had followed the minute instructions of the court as they were understood at the time. Testifying from memory, aided only by some loose memoranda kept, they further say in effect, that, in making up the amount of the award of \$22,900, the sum of \$5,000 was included for injury to the business of Hunter. In other words, according to their memory as to what occurred five years before, \$5,000 was allowed for damage, interruption, etc., of Hunter's business, *i. e.*, for "taking a man's business away from him." Whereupon the court entered its order, to which this writ of error was awarded, reducing the amount of the award from \$22,900 to \$17,900.

The ruling of the court, setting aside the award of the first commissioners, was assigned by counsel for defendant in error as cross-error under Rule IX of this court, but the assignment was waived, as the evidence upon which the award was made is not properly a part of the record brought before us.

The first question for our determination is, What was the true rule, under the constitutional and statutory inhibition, that private property shall not be taken for public uses without just compensation, governing in ascertaining the damages to Hunter when his property was taken?

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It is most earnestly and ingeniously argued by counsel for plaintiff in error, that as the Constitution forbade the taking of any private property whatever, without *just compensation* being made to the owner thereof, in construing our statute in relation to the exercise of the power of eminent domain by a private corporation, the court should give to the language employed in the Constitution and the statute, a meaning sufficiently broad to enable the owner of property to demand and receive *just compensation* for not only the property taken, but for any property rights sacrificed or impaired by the taking, which would include injury to the business theretofore conducted on the property, and the consequential costs incurred in changing the locality of the business. In other words, the business conducted by Hunter on the property taken, was a property right—private property—coming within the protection afforded by the Constitution and the statute, which could not be interrupted or damaged without *just compensation*.

Of the numerous decisions of other States cited in the petition for this writ of error, we need only say that they do not support the contention of counsel when the whole of the decision is read, or else were rendered under constitutions and statutes different from the constitution and statutes controlling in the decision of this case, or are cases where part of a tract was taken and damage to the residue was the point considered, or cases of temporary suspension of business, where the loss was capable of being estimated. It is a matter of course that, where the constitution and statute of a state provide, not only for just compensation for property taken, but for all damages that the owner may suffer by reason of the taking, the rule governing in ascertaining the amount of damages to be awarded the owner, would be very different from the rule so long established in this State, and followed by the lower court in this case, where the whole property is taken and no question arises as to damages beyond the fair market value of the property.

In a note to *Hamilton v. Pittsburg &c. R. Co.*, 51 L. R. A.

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330, reviewing the decisions of other states on the subject, it is said: "Some of the cases have permitted evidence of and recovery for profits lost by the suspension of business, where it has to be moved during the time required for obtaining another situation and for moving. This allowance is based upon the theory that, as the loss of profits from the suspension of business while moving would enter into the consideration of the price to be charged by an owner voluntarily selling, it should be considered in determining the market value in case of a compulsory sale under eminent domain proceedings."

Those cases are authority for the proposition that, where property is taken for a public use, requiring a removal of a business conducted on it theretofore, the owner, apart from the value of his property taken, the expenses incurred in moving, etc., is entitled to recover for loss of profits from the suspension of business while moving; but this rule of law finds no sanction in our own decisions, nor is it regarded as the established rule by the weight of authority in this country.

We are called upon also to consider a line of decided cases supporting the proposition, that the owner of property is entitled by law to the undisturbed and exclusive enjoyment of his estate, and to keep out all trespassers, this being a part of his property in his estate; but clearly they do not apply, as defendant in error was in no sense a trespasser upon the property of Hunter or his property rights, when proceeding, by authority of law, to acquire title to his property by condemnation for a public use.

Citation of another line of cases is also made in support of the contention, that the quiet use and enjoyment of property is to be separated and distinguished from the property itself, so as to entitle the owner to just compensation for both, when the property is taken in the exercise of the power of eminent domain; but, again, we have to say that these cases do not apply to this case. The leading case in that line of cases is *B. & P. R. Co. v. First Bap. Church*, 108 U. S. 331, 27 L. Ed. 739, 2 Sup. Ct. 719. In that case, the judgment of the lower

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court, in favor of the church, was upheld, on the ground that the engine-house and repair shop, as they were conducted by the railroad company, were a nuisance in every sense of the term, and for the annoyance and discomfort of the congregation in the enjoyment of their church edifice for religious exercises, prayer and worship, courts of law would afford redress by giving damages against the wrong-doer, and when the causes of annoyance and discomfort are continuous, courts of equity would interfere and restrain the nuisance. That is by no means the case we have before us.

With respect to our own decisions, we are told in the argument, that, while the measure of damages in many cases may be the market value of the property condemned, in ascertaining that value it is competent to prove any use, the highest and best use, for which it is adapted; but the most enlightened courts have never held that the market value is the only standard, and that cases may not, and do not, arise where a proper observance of the constitutional provision, that private property shall not be taken for public use without just compensation, may require the award of damages actually sustained, other than those measured by the market value of the property taken.

By an unbroken line of decisions of this court, in harmony with the text-writers and the decisions of other States having a constitutional provision similar to our own, the rule governing in ascertaining the damages to the owner of property taken, as in this case, is, that he shall be paid the fair market value of the property at the time of its taking; but no effort has ever been made to fix beforehand all of the things which may go to make up the market value of property, while it has not been so difficult to say that a particular element of damage or loss does not enter into the market value, and should not be included. In other words, what elements properly enter into consideration in determining the market value of property is necessarily an open question in every case of this character; but it is not necessary to consider that question at length in this case.

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The authorities agree that loss of profits in a business destroyed or damaged, where property is taken in the exercise of the power of eminent domain, is not an element for consideration in determining the market value, because a matter of speculation and conjecture, while the profits earned in a business conducted on the property taken are proper to be considered in determining the market value of the property. If "the cost of reproduction, is the very lowest amount which should be awarded a person whose business is taken away from him by the strong arm of the law," and this amount should be increased by other considerations, such as the disturbance of business, incidental expense in storing merchandise, etc., as is contended by the learned counsel for plaintiff in error, the question naturally presents itself, Why did not the framers of our constitutional and statutory provisions against taking private property for public use, without just compensation, so declare?

How far the reasoning in support of the view contended for by counsel would control, where only a part of the owner's property is taken, and the damage to the residue is also to be ascertained and paid him, or where, as under our present Constitution, it is provided that private property shall not be taken or *damaged* without just compensation, we are not called upon to consider, as the rights of Hunter are fixed by the provisions of our old Constitution, which was superseded by the new on July 10, 1902.

Counsel would have us disregard the decisions of this court and follow the reasoning of other State courts, conflicting more or less with our own decisions, upholding the rule that the market value of property taken, as in this case, is the guide in ascertaining the just compensation to be paid the owner; but, as we have said, we are unable to find that our decisions are out of harmony with the great weight of authority in this country.

In *Richmond &c. R. Co. v. Chamblin & Scott*, 100 Va. 401, 41 S. E. 750, it is said: "In determining the value of land appropriated for public purposes, the enquiry must be, What is

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the property worth in the market for its availability for valuable uses, both now and in the future? \* \* \* The authorities we have cited from the adjudicated cases and text-writers, seem to us, sufficient to justify the commissioners in taking into consideration the use to which the property has been devoted by Chamblin & Scott as an element entering into their estimate of its market value." But it was there also held, that "damage to trade or business is generally too remote to be a subject of damages."

With reference to that case, counsel point to the fact that only a text-writer and an encyclopedia are cited in support of the last proposition, but fail to point out wherein the decision itself is out of harmony with the long line of decisions by this court, to which it belongs.

In *Richmond & P. R. Co. v. Seaboard &c., Co.*, 103 Va. 399, 49 S. E. 512, the opinion says: "It is the present actual value of the land, with all its adaptations to general and special uses \* \* \* that is to be considered." And, again, quoting from Lewis on Eminent Domain, "The conclusion from the authorities and reason of the matter, seems to be that witnesses should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. \* \* \* But, when all the factors and circumstances have been shown, the question at last is, What is it worth in the market?"

Without attempting to review the authorities further, the established rule of this court, recognized and approved by text-writers and by the Supreme Court of the United States, is, that the full and perfect equivalent for the property taken in proceedings of this character is what the law contemplates as the market value thereof, and no sufficient reason or authority is brought to our attention which would justify us in departing from that established rule in this case.

It remains, however, to be determined whether or not the court below erred in holding that \$5,000 of the award made



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to Hunter was for damage to his business, and properly struck that amount out of the award.

The undisputed facts are, that the property taken was erected for the identical business which Hunter was conducting at the time; that the property had been devoted to that business for more than forty years; that Hunter had conducted the business at that stand since January, 1891; that the building was large, strong and thoroughly adapted to storing and handling heavy machinery, such as farming implements, wagons, etc., which was the business being conducted by Hunter; that the alley-way afforded facilities for receiving and shipping stock which could scarcely be duplicated in the city of Richmond; and that the annual profits of Hunter's business conducted on the property had been from \$4,300 to \$4,500 until 1899, when the annual profits were \$6,000, and there had been a steady growth in the business. A number of leading business men, speaking from experience, testified that no amount less than \$25,000 would compensate Hunter for having his property taken from him, and some of them say that they, if in Hunter's place, would not part with the property for \$25,000, and still others fix the value of the property at more than that amount. In other words, they regarded the property, by reason of the uses made of it, its convenience and advantages, and yielding a profit from the business conducted thereon, as above stated, as worth, in the market, the sum of \$25,000. It is true, that other witnesses, mainly engaged in the real estate business, do not agree in the views of the witnesses testifying for Hunter, and therefore, do not estimate the market value of the property as high, nor did the commissioners allow Hunter the full amount to which his witnesses, by a consensus of opinion, considered he was entitled.

In *Richmond &c. R. Co. v. Chamblin & Scott*, *supra*, the court expressly disclaimed an intention of considering all the elements that go to constitute the value of the property, saying that "the best that can be done is to appoint capable and up-

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right commissioners to go upon the land, examine and hear testimony, and consider all the facts and circumstances surrounding the situation, and likely to enter into, the value of the land to be taken, and the effect of such taking upon the residue of the tract." In discussing the elements of damage which the commissioners should have taken into consideration in ascertaining the compensation to which Chamblin & Scott were entitled, the opinion says: "In any business, and especially such as involves the movement of heavy freight, ease of access to and from the place where it is conducted, and facility in reaching lines of transportation, must be important, if not controlling factors, and as the value of property consists in its fitness for profitable use, its market value must be influenced, in large measure, by locality. There is no evidence in the record showing the profits of the business of appellees, and this is as it should be, but it is shown that the movement of freight from the premises to the railroads and from the railroads to the land in question, would be very much more difficult and costly, and these causes would affect any business, by whomsoever conducted at that place.

The report of the commissioners in this case did not afford the court any information as to how the amount of the award to Hunter was arrived at, and, as has been remarked, it was about five years after their report was made, and made in accordance as they testify with the instructions of the court, before the commissioners were called upon to state the grounds of their award, and this, after all vestige of the property condemned had been destroyed and the ground on which Hunter's business had been conducted, appropriated for railroad purposes, rendering another view of Hunter's property, as it was when taken, impossible. The testimony of the commissioners as to what were the elements they considered in making up their award is, in the very nature of the case, vague and unsatisfactory, and they in fact, admit that, after that lapse of time, they could not say positively anything, except that they followed

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the explicit instructions of the court as to the elements of value. True, they each, aided only by some memoranda furnished by one of them undertake to say that \$5,000 was allowed for damage, interruption, etc., to the business—that is, “for taking a man’s business away from him.”

The vagueness and unsatisfactory character of this testimony, given at so late a day, after they had made their award and filed it with the court, is made all the more apparent when read in connection with the evidence to which we have adverted, going to show that the market value of Hunter’s property, when taken, was at least the amount of the award, without any sort of reference to damage to his trade or loss of profits in his business.

It has been again and again declared by this and other courts, that, in the very nature of things, the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof. *Richmond & Petersburg R. Co. v. Seaboard &c. R. Co.*, *supra*, and authorities cited.

In *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E., 906. this court said: “When it becomes necessary to ascertain what is just compensation for land taken for public use, as in the present case, the statute directs that the court shall appoint five disinterested freeholders as commissioners to perform this duty, and requires that, in its performance, they shall themselves view the land so taken. The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself which is taken, and judging as to its value. \* \* \* They have, as they also had here. after having their attention especially drawn to the element of damage relied upon, the opportunity to apply the evidence produced before them to the subject of the controversy, and to determine the weight to be given to its several parts. We are without the benefit of their opportunities and of what they saw

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and were the judges, and it should be a very clear case, indeed, of inadequate compensation to justify the court in disturbing their sworn, deliberate and disinterested judgment as disclosed in their report."

In *Shoemaker v. United States*, 147 U. S., 282, L. Ed., 13 Sup. Ct. 361, the opinion, quoting from *Mills on Em. Dom.*, says: "An appellate court will not interfere with the report of commissioners to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages, there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions." See also the recent case of *Tidewater Ry. Co. v. Cowan*, 106 Va. 817, 56 S. E. 819.

While, on the face of the report in this case, which was borne out by the evidence returned therewith, there appears nothing going to show that any improper elements of damage entered into the award, these commissioners, long after the award, and when the whole matter had gone entirely out of their minds, each undertakes to speak for himself as to what elements of value were considered, although each of them had signed the report at the time it was made. We find nothing in the instructions of the court to justify the conclusion that the commissioners were misled to take into their consideration improper elements of damage.

When testifying from memory, confessedly uncertain by reason of the lapse of time, they, in effect, agree that \$5,000 of the award was "for taking a man's business from him," but whether this, and other like considerations, had influenced them only in agreeing upon the fair market value of Hunter's property, or

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had induced them to allow \$5,000 for taking Hunter's business from him, in addition to the fair market value of his land and buildings taken, does not clearly and satisfactorily appear, and under the conditions then existing, no reasonably fair test could be made as to whether the market value of the property of Hunter taken was or not as much as the amount awarded him, considering only proper elements of damage in such cases, as every vestige of Hunter's property, except the land itself, had been removed, and the land occupied by buildings or other structures of the defendant in error. The record shows that these commissioners were capable and upright men of business experience, and with large business interests, requiring their constant attention, and doubtless when they had discharged the duties required of them by the court's order, signed and filed their report, the whole matter was discarded from their minds, so that, when called on to testify touching the considerations that influenced their award, it was quite natural that they could not, upon their oath, be positive as to anything, except that they had followed the instructions of the court in reaching their conclusion. Upon the face of the report, there appears no infirmity, and, as has been stated, there was evidence taken which, besides the view of the property by the commissioners, would have justified them in fixing the market value of Hunter's property at the amount of their award.

The established rule that the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof, is not to be disregarded or even affected by the mere fact that the evidence relied on to show that the finding is erroneous, is given by the commissioners themselves. The question in such a case is, whether or not the proof can be considered as sufficiently clear and satisfactory to warrant the setting aside of the award of the commissioners, made upon evidence before them at the time, aided, and greatly aided in the majority of cases, by the evidence of their own senses, they having the advantage of seeing the property itself, which is taken, and judging as to its value.

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In view of the facts and circumstances which have been narrated, we do not consider that the proof relied on as justifying the lower court in striking from the award made by the commissioners of \$22,900 as the value of Hunter's property taken in these proceedings, the sum of \$5,000, because improperly included in the award, for damages to business, etc., is that clear and satisfactory proof, which the established rules of law require; therefore, the judgment of the lower court will be reversed and annulled, and the cause remanded to that court, to be further proceeded with in accordance with this opinion.

*Reversed.*

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Statement.

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**Wytheville.****MERRITT v. BUNTING.**

June 13, 1907.

**1. DEEDS—Description of Land—Case at Bar—Vendor and Purchaser.—**

A deed conveying land, in order to be valid against a subsequent purchaser, must so describe and identify the property conveyed as to afford the means, with the aid of extrinsic evidence, of ascertaining with accuracy what is conveyed and where it is. In the case at bar, the land conveyed was described as situated on Chincoteague Island and embraced within certain courses and distances, but no starting point or ending point is given, and hence the location of the land could not have been ascertained, and the deed is inoperative as against a subsequent purchaser for value even if he had notice of its existence.

**2. NEW TRIAL—Misconduct of Party Subsequent to Verdict.—**

Where it appears that a defendant in an action at law, immediately after a verdict in his favor, stated that he had never lost a case and never expected to if it was left to a jury, and gave five dollars to each of the jurors, and both he and they were fined for contempt, and he thereupon paid the fine assessed upon several of the jurors, and it also appears that he attempted to bribe an important witness for the plaintiff, the trial court should set aside the verdict rendered in his favor, notwithstanding both defendant and jurors had been punished for their contempt.

Error to a judgment of the Circuit Court of Accomac county in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

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Statement.

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The following is a copy of the deed from Governor Holliday, referred to in the opinion of the court:

"Fred. W. M. Holliday, Esquire, Governor of the Commonwealth of Virginia; To all to Whom these Presents shall come—Greeting:

"Know ye, that in conformity with a survey made on the twenty-second day of November, one thousand, eight hundred and seventy-six, by virtue of Land Office Treasury Warrant No. 30,034, there is granted by the said Commonwealth unto John W. Bunting a certain tract or parcel of land, containing twenty-six and nine one hundredths acres, lying and being in the County of Accomack, on Chincoteague Island, and bounded as follows, to-wit:

"Beginning at 'a' thence S. 50° E., 7.50 chains to 'b,' thence N. 40° E., 24.00 chains to 'c,' thence N. 27° E., 2.50 chains to 'd,' thence N. 13° W., 5.00 chains to 'e,' thence N. 85° W., 15.00 chains to 'f,' thence N. 49° E., 15.50 chains to 'g,' thence N. 31° W., 1.00 chains to 'h,' thence S. 54½° W., 20.80 chains to 'i,' thence S. 75½° E., 17.60 chains to 'j,' thence S. 48° W., 24.00 chains to the beginning, with its appurtenances. To HAVE AND TO HOLD the said tract or parcel of land, with its appurtenances, to the said John W. Bunting and his heirs forever.

"In witness whereof, the said Fred. W. M. Holliday, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand, and caused the lesser seal of the said Commonwealth to be affixed, in Richmond, on the second day of April, in the year of our Lord, one thousand, eight hundred and seventy-eight, and of the Commonwealth, the one hundredth and second.

(SEAL OF VA.)

FRED. W. M. HOLLIDAY."

*Jno. S. Parsons* and *G. Walter Mapp*, for the plaintiff in error.



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*S. K. Powell and J. H. Fletcher*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

D. M. Merritt, plaintiff in error here, defendant in the court below, on the 12th day of June, 1905, pursuant to the statute commonly spoken of as the "Oyster Laws," obtained an assignment from the oyster inspector of District No. 1, Accomac county, of two parcels of oyster-planting ground, aggregating 24.62 acres, situated on Little Assateague Bay, near Chincoteague Inlet in said county; he having paid the fees and done all required of him by law, to entitle him to the assignment.

At the October rules, 1905, of the Circuit Court of Accomac county, John W. Bunting, defendant in error here, brought an action of ejectment against Merritt to recover the possession of certain oyster-planting ground embraced within certain lines given within the declaration filed, which include the 24.62 acres in the possession and occupancy of Merritt, by virtue of his assignment from the oyster inspector of District No. 1, Accomac county.

At a trial of the cause, at a special term of the circuit court, held February 16, 1906, a verdict was rendered by the jury in favor of the plaintiff for all the land embraced within the lines given in his declaration, which verdict the circuit court, at its March term, 1906, refused to set aside, and judgment was entered thereon in favor of the plaintiff for the possession of the 24.62 acres, held and occupied by the defendant Merritt, under his aforesaid assignment from the oyster inspector, the plaintiff, in open court, having disclaimed all right, title and interest in and to so much of the land embraced in the verdict as had been theretofore assigned to other parties by the oyster inspector of District No. 1, Accomac county, and containing 4.55 acres. It is to that judgment this writ of error was awarded.

To sustain his right to the possession of the lands demanded

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in his declaration, Bunting relied, in part, upon three several deeds introduced in evidence, conveying to him certain lands in Accomac county, adjacent to or bordering on Little Assateague Bay, and also a grant from Fred. W. M. Holliday, Governor of Virginia, for 26.09 acres, dated April 2, 1878, which had never been recorded in Accomac county, to the introduction of which grant Merritt objected, but his objection was overruled, and to this ruling, he duly took an exception, and made it a part of the record, which exception constitutes his first assignment of error in this court.

To sustain his contention that, as a riparian owner, he also owned the whole of Little Assateague Bay, it was necessary for Bunting to establish his ownership of the lands adjacent to the bay on all of the shore sides thereof, and without the benefit of the grant from the Governor of the Commonwealth of April 2, 1878, he would have failed to show that he was the owner of all the lands situated on the bay and extending down to low water mark. In other words, Bunting's claim is, that he owned the whole of the bay by virtue of owning the high ground around the bay; that his title as owner of the ground around the bay extended to low water mark; that the bay ebbed bare; and that he, therefore, owned the whole of the bay.

The objection to the introduction of the grant from the governor of the commonwealth, which was necessary to Bunting in order to show title to the high land on one side of the bay, was (1), that the patent in question had not been recorded in Accomac county prior to Merritt's becoming the purchaser of the land for value, and was void as to him, he having neither notice nor knowledge of the grant at the time he took his assignment of the land in question from the oyster inspector, as before stated; and (2) that the description of the land embraced in the grant is so vague and indefinite, that no one can locate the same from the description given therein.

Whether or not it was necessary to record this grant in Accomac county, in order that it should operate as notice to sub-

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sequent purchasers or incumbrancers of the land intended to be granted, we need not determine, as the grant, in our judgment, is too vague and indefinite as to the location of the land it purported to grant, to be considered as sufficient to give notice of the rights of the patentee, even if a subsequent purchaser or incumbrancer of the land had actual notice of it. It is true, as counsel for Bunting contend, that if the identity of the premises mentioned in the grant can be ascertained by extrinsic testimony, the grant would be valid; but, as we shall presently see, the authorities relied on, in support of that contention, do not apply to a case like this, where there is no description in the grant, even with extrinsic evidence sufficient to enable a party interested to identify the premises intended to be granted.

In this case, there is nothing in the grant to show where the land intended to be granted is located, except that it is on Chincoteague Island, and embraced within certain courses and distances. There is no starting point or ending point given. Therefore, by the grant, any starting point might have been taken, and the courses and distances run therefrom, provided the land thus located was situated on Chincoteague Island.

The county surveyor of Accomac county, while testifying for the defendant Merritt, was shown the grant from the Governor of Virginia to Bunting for 26.09 acres, and asked if, from the description given in that grant, he could locate the land supposed to be granted. He replied that he could not, as there was nothing in the grant to show where the land was located, except that it was on Chincoteague Island, and was embraced within certain courses and distances, no starting point or ending point being given. He does, however, testify that he did locate the land embraced within the grant for Bunting, but that Bunting took him to this Little Assateague Bay and told him that the survey extended around the eastern side of the bay; that the surveyor, Bagwell, started at a point opposite the canal, which empties into Chincoteague Channel, and then

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surveyed around the bay. But he further testifies that the survey made by Bagwell could not have started at that point, for, if it had started there, laying off the grant, and running the courses and distances given in the grant, a great part of the land would have been in said bay, and, further, that the said survey could not have started at that point, at which one of the chain carriers, at the original survey, claimed it did, to-wit, at a point about half way between the east mouth of the canal, emptying into channel, and Little Island in Assateague Bay, because, running the courses and distances given in the grant, the land, or a greater part of it, would have been located in the bay. He gives other reasons for the conclusion that no survey had been made or could have been made, locating the land embraced in the grant adjacent to Assateague Bay from the description given in the grant, but that such surveys as had been made were made by the arbitrary direction of Bunting himself.

Even a recorded instrument, conveying land, to be sufficient to give notice under the registry laws to a subsequent purchaser or incumbrancer, must so describe and identify the property conveyed, as to afford the means of ascertaining with accuracy what and where it is.

In *Florance v. Morien*, 98 Va. 35, 34, S. E. 891, Buchanan, J., says: "The recorded instrument is sufficient to give notice under the registry laws, if the property be so described and identified that a subsequent purchaser or encumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that if he should examine the instrument itself, he would obtain notice of all the rights which were intended to be created or conferred by it." See also *Reid v. Rhodes*, 106 Va. 701, 56 S. E. 722.

In *Mundy v. Vawter*, 3 Gratt. 494, a conveyance of "all the estate, both real and personal," to which the grantor "is entitled in law or equity, in possession, remainder or reversion," was held valid to pass the grantor's whole estate as between the

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grantor and grantees, but that the registry of such a deed conveying land by such general description is not notice in law to a subsequent purchaser from the grantor of the existence of said deed; that actual notice of such a deed and of its contents would not affect a subsequent purchaser, unless he had notice that the land purchased by him was embraced by the deed; and that the proof of such notice must be such as to affect the conscience of the purchaser, and is not sufficient if it merely puts him upon inquiry; it must be so strong and clear as to fix upon him the imputation of *mala fides*. The opinion in that case was by Baldwin, J., and the reasoning applied there is entirely applicable to the case at bar.

As we said in the outset, if Merritt had had actual notice of the grant in question, it would not have been sufficient to charge him with notice of any right in Bunting to the land which is in controversy in this suit. We are, therefore, of opinion that the circuit court erred in not rejecting the grant when offered in evidence; and for this error, its judgment must be reversed and a new trial awarded.

If a new trial in this case were not awarded for the reason stated, we would feel constrained to award it for the following reasons:

Just after the trial of the case, to a remark made to him by a friend, "Well, Captain, I thought you were going to lose your case," Bunting replied: "But I didn't do it, did I? I never lost a case in this court and I never expect to, if it is left to a jury." Bunting went immediately out of the court-house and followed up the jurors, handing to each of them, who had not left for their homes \$5.00, and sent \$5.00 to each of those who had left. Afterwards, upon a rule awarded by the judge of the circuit court against Bunting and the jurors, to show cause why they should not be fined for contempt in the giving by Bunting and the receiving by the jurors each of \$5.00, in the manner and under the circumstances stated, Bunting was fined \$25.00 and four of the jurors \$5.00 each for the alleged

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contempt; whereupon Bunting stepped up and requested to be and was allowed the privilege of paying the fines imposed upon the four jurors.

After the application by Merritt to the oyster inspector for the assignment of the oyster grounds in question had been posted according to law, Bunting, upon learning of the posting, complained to the oyster inspector that the land applied for belonged to him, and said to the inspector that if the land did not belong to him, he was willing to pay taxes on it himself, and in conversations with the inspector and by letters to him, it is clear that he tried to bribe the inspector to assign the land to him (Bunting) instead of to Merritt. The inspector testified that Bunting took him off in a room to himself in a hotel on Chincoteague Island, and told him that he was not trying to bribe him at all, but there were tricks in all trades, and then went on to relate that he used to be running a blockade during the Civil War, and would enter and go out of New York harbor without any trouble, when the other fellows could not do it; that he took along with him some \$10.00 bills. To this the inspector, Taylor, replied: "Well, Captain Bunting, your \$10.00 bills will not get you into this harbor." Bunting did not deny this on the witness stand, but admitted having written to the inspector, "offering to give him as much as anybody else would to assign him (Bunting) the grounds; stating that the reason he did this was because he had been told that, in order to get an assignment of the grounds, he would have to "grease Taylor a little;" that subsequently he saw Taylor on Chincoteague Island, and told him he was in a position to give him as much to assign the grounds to him as anyone else, if he were being paid anything.

Such conduct on the part of a litigant and jurors casts a cloud of suspicion over the result of the trial, and to allow a litigant to reap the benefits of a verdict obtained under such suspicious circumstances, would, as it appears to us, be a reproach upon the administration of justice in this state. It is

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true the learned judge below very promptly and properly attempted to punish and to reprove the parties engaged in this improper conduct, but that does not, in our opinion, reach the evil, which should be uprooted, even if it required not only the punishment of the parties implicated, but the setting aside of any verdict rendered under such circumstances.

A Captain Hill, a friend of Bunting, testified that, though Bunting was a wealthy man, and abundantly able to give such "tips" as \$5.00 to jurors, who had rendered a verdict in his favor in a doubtful case, he was rather a close man, and, although he had been on the island with Bunting and known him for a long time, he had never heard of his giving \$5.00 to anybody before, not even to the poor. This witness also testifies that he had heard rumors around that Bunting had talked with a certain one of the jurors during the trial, but said he did not know who he had heard make this statement.

The admission of Bunting is, that when he had reason to expect litigation with Merritt over the right to lease and occupy under the statute, the oyster-planting grounds involved in this case, he wrote the oyster inspector, whose duty it was to assign the grounds, as required by the statute, and who was in a position to give Bunting, as he thought, an undue advantage over Merritt, "offering to give him (Inspector Taylor) as much as anybody else would to assign him, Bunting, the grounds, stating that the reason he did this was because he had been told, that in order to get an assignment of the grounds, he would have to 'grease Taylor a little';" and further, that subsequently, he told Taylor in person that he was in a position to give him as much to assign the grounds to him, Bunting, as any one else, "if he was being paid anything." In other words, Bunting admits that he was, by illegal methods—bribery—seeking to obtain through this public official, the oyster inspector, an undue advantage over Merritt in an anticipated litigation.

This conduct on Bunting's part is not only well calculated to cause distrust in the integrity of our courts, which have been

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for centuries regarded as the great bulwark of the liberties and immunities of the citizen against encroachment from any quarter, but, when considered together with the other facts and circumstances appearing in the record, arouses such a grave suspicion that something other than the law and the evidence influenced the jury in arriving at their verdict as to require that such conduct on the part of any litigant be condemned in the severest terms, so that it may be understood that a verdict obtained under such circumstances, will not be sanctioned by a court of justice.

We are of opinion, for these reasons, as well as for the error in admitting at the trial the improper evidence adverted to, that the judgment of the circuit court should be reversed and annulled, the verdict of the jury set aside, and a new trial awarded.

*Reversed.*



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Opinion.

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**Wytheville.****BURNETTE v. YOUNG.**

June 13, 1907.

1. EVIDENCE—*Parol Evidence to Show Alteration of Writing.*—Parol evidence is admissible to show that, after an unsealed paper had been executed, delivered and recorded, a scroll, by way of a seal, was affixed to the name of the maker, both on the original paper and on the record, without the knowledge or consent of the maker.
2. DEEDS—*Absence of Seal—Conveyance of Land.*—A paper concluding "Witness my hand and seal," but to which no seal, or scroll by way of seal, is annexed, is not a sealed instrument, and is ineffectual to convey land in this state.

Error to a judgment of the Circuit Court of Henrico county, in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Jno. B. Swartwout and Alex. H. Sands*, for the plaintiff in error.

*Isaac Diggs, M. H. Omohundro and E. B. English*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Plaintiff in error, Virginia O. Burnette, was, on the 5th day of June, 1905, the owner in fee simple of a certain tract of

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land in Henrico county, Virginia, containing 121 acres, with improvements thereon; and on that date she, at the office of M. H. Omohundro, an attorney at law, in the city of Richmond, signed a certain paper, which she claims was not a deed, but a contract to convey the said farm in fee simple to appellees, D. V. Omohundro, the wife of said M. H. Omohundro, and M. R. Casselman, the wife of one Lawrence Casselman, with certain privileges reserved to herself to take back the farm within a certain time. This paper was taken at once to the clerk's office of Henrico county, and spread upon the records of deeds in that office, the acknowledgment of plaintiff in error of the execution of the deed having been, in due form, certified by a notary public for the city of Richmond.

On the 11th day of October, 1905, D. V. Omohundro and M. R. Casselman, by deed, in which their respective husbands united, conveyed the said farm to the defendant in error, Alice M. Young, and by virtue of that conveyance, which was also recorded in the clerk's office of Henrico county, she took immediate possession of the property, in November, 1905; whereupon plaintiff in error, to the second December rules, 1905, instituted this action of ejectment to recover of the defendant in error the possession of the said property.

No notice of the intention to set up equitable defense having been filed for defendant in error, as provided by sec. 2743 of the Code of 1887—same section, Code, 1904—the trial was had upon the general issue of not guilty.

The sole question presented is, whether or not the so-called deed of June 5, 1905, was sufficient in law to pass from plaintiff in error to defendant in error's grantors the legal title to the property in dispute, and the right to the possession thereof.

Plaintiff in error sought to and did prove that there was no seal or "scroll" affixed, by way of seal, to this deed at the time the same was signed and delivered, but that the same, without the knowledge or consent of plaintiff in error, was subsequently affixed and added thereto. It appears that on the 23rd day of

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June, 1905, and after it had been spread upon the deed book of Henrico county clerk's office, M. H. Omohundro, upon examining this deed, found that neither upon it, nor the deed book, where it was recorded, was there a seal or a "scroll" affixed by way of seal, and he then added the seal after the signature of plaintiff in error, and the deputy clerk added the same to the recorded copy in the deed book.

After this proof had been admitted, it was, on the motion of defendant in error, and over the objection of plaintiff in error, stricken out; and the court, by the refusal to give instruction "C," asked for by plaintiff in error, and in giving instruction No. 1, asked for by defendant in error, in effect, directed the jury to find a verdict for the defendant, which they accordingly did, and judgment was entered thereon against plaintiff in error.

It was sought by instruction "C" to have the jury told that the legal title to land in this state can only pass between parties by deed; that no instrument in writing is a deed unless there is affixed to the signature of the signer a seal, or else what is known in law as "a scroll," affixed by way of seal; and if the jury believed from the evidence in the case that the deed offered in evidence by the defense, as a deed from plaintiff in error to D. V. Omohundro and M. R. Casselman, had no seal or "scroll" affixed by way of seal thereto, at the time the same was signed and acknowledged, but was subsequently affixed or added, the instrument failed to carry the legal title from the plaintiff in error, regardless of whether she intended to make a deed conveying the property or not.

Instruction No. 1, given in lieu of instruction "C" refused, is as follows: "The court instructs the jury that the deed from Mrs. Burnette to Mrs. Casselman and Mrs. Omohundro, dated June 5, 1905, was duly and properly admitted to record on the same day, and that Mrs. Young, the purchaser, is not bound by anything except by the record, and that they should not consider any oral testimony tending to impeach said recorded deed, and should, therefore, find a verdict for the defendant."

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The jury were thus instructed upon the theory that parol evidence was inadmissible to prove that there was no seal attached to the deed in question when signed by plaintiff in error, nor when spread upon the records of the clerk's office, but when it was withdrawn from the office without her knowledge or consent, the seal was added to the deed annexed to her signature, and the deputy clerk copied the same in the deed book.

It is unquestionably true that parol evidence will not be admitted to vary the terms of a written instrument, but when the parol evidence was offered in this case, it was not for the purpose of varying the terms of the written instrument, but to show that the instrument was absolutely void or that it never had any legal existence, by reason of fraud or by reason of want of due execution. Defendant in error was standing upon the deed in question as conclusive evidence of her right to the possession of the property the instrument purported to convey, and it would be a harsh doctrine indeed that excluded evidence on behalf of plaintiff in error to show that the instrument never had any legal existence, by reason of forgery, alteration or fraud in its procurement, or the want of due execution or other reasons for which the instrument would, in law, be absolutely void.

1 Greenleaf's Ev. sec. 284, referring to the rule as to the admissibility of parol evidence affecting written instruments, says: "It is, in the next place, to be noted that the rule is not infringed by the admission of parol evidence, showing that the instrument is altogether void, or that it never had any legal existence or binding force, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject matter; this qualification applies to all contracts, whether under seal or not."

Sec. 1511, Elliott on Evidence, is as follows: "The rule which forbids the admission of parol evidence to vary a written contract, has no application to evidence offered to show a fraudulent or unauthorized alteration in a written instrument, and relevant parol evidence is admissible to impeach such an instrument on that ground."

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It was held in *Herring v. Lee*, 22 W. Va., 672, that if a record is interlined or erased by some unauthorized person, such alteration constitutes no part of the record, and it may be assailed by parol testimony; that this is not controverting the absolute verity of the record, but it is simply inquiring as to what really constitutes the record, and if this were not so, a forged record could be imposed upon the court as genuine by a mere intruder or usurper.

The case of *Patton v. Fox*, 169 Mo. 97, 69 S. W. 287, was an action in ejectment, in which the plaintiff offered a deed in evidence as a part of his chain of title, and the defendants offered evidence that this deed was a forgery, which evidence was objected to; but the court held that it was admissible, the opinion saying: "If the deed of trust upon which the plaintiff's right of possession rests, was a forgery, it was void, and hence the plaintiff never had a right of possession. Therefore, under a general denial, the defendants can show that a deed in the plaintiff's chain of title is a forgery, and thereby show that the plaintiffs are not entitled to possession."

To the same effect is *Holmes v. Green*, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893, also *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142.

In *Stanley v. Hansel*, 35 Neb. 160, 52 N. W. 888, which was an action in ejectment, the court said: "The evidence tending to show that the deed from Plummer to Christopher was obtained by fraud and undue influence, was, however, admissible of the answer."

In *Barnet v. Abbot*, 53 Ves. 120, parol evidence was held admissible to prove that a bond was ante-dated; that it was not sealed at the time of signing; and that the sureties never authorized any one to seal it.

In the case of *Wren v. Fargo*, 2 Ore. 19, parol evidence was held admissible to show that a bond accepted by a commissioner for a county was altered after such acceptance, the court saying: "If it could not be admitted for such purposes under such cir-

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cumstances, it would be in the power of anyone who might have charge of the records, or might obtain access to them, to make material alterations in them and thus make them read entirely different from the way they were originally made." See also *Coit v. Churchill Co.*, 61 Ia. 296, 16 N. W. 147.

In *Everman & Co. v. Robb*, 52 Miss. 655, 24 Am. Rep. 682, parol evidence was admitted to prove that a lease, acknowledged and recorded, had been altered after it had been signed, the opinion holding that the testimony was pertinent and relevant as tending to prove that the instrument was void, as the alleged alteration was in a material matter, and whether it would have been sufficient to satisfy the jury, was not a question for the court to decide.

In *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725, the court holds that the rule of the common law, that alterations in a deed avoid it, applies to mercantile paper, and the opinion is to the effect that a material alteration in a deed or in any commercial paper avoids it, provided, always, that the alteration is without the consent of the party sought to be charged or affected by the alteration.

The case of *Bias v. Floyd, Governor*, 7 Leigh 640, was a *scire facias* on a recognizance taken before a justice of the peace and certified to the superior court of the county in which it was taken, and the defendant offered evidence to prove that the recognizance had been materially altered after it was taken and without the defendant's knowledge or consent, which evidence was excluded, upon the theory that it was inadmissible because introduced to vary the terms of the record; but this court reversed that ruling, the opinion by Tucker, P., saying: "It would be a reproach to the jurisprudence of any country, if a material alteration in an obligation, however solemn, or even in the records of the court itself, to the prejudice of a party, could be in no wise corrected. In this case, the parties entered into a recognizance which would have been void if it had remained unaltered. It is changed; it is never re-acknowledged

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by them after the change, and the principal does not even know of the change. It is impossible to consider them as bound by the instrument in its present form."

In the case before us, it unmistakably appears that the deed in question was never in fact a deed, for the reason that there was no seal affixed to it. The statement of Omohundro, who withdrew this paper from the clerk's office, is: "To the best of my recollection, when I came down to withdraw the deed from the records, Mr. Leech and myself compared the deed, and when we got through he asked me did I notice anything lacking on the deed. I told him I did not. He said: 'How about the seal?' I told him, 'There is the seal on it, Witness my hand and seal, I consider that a seal.' He said, 'There is no scroll or seal at the end of the name.' I said, 'That don't matter.' He said, 'Better have it on there,' and he handed me a pen and I put it on. I don't know whether it was the word 'seal,' or the brackets too; it strikes me the brackets were there, and I wrote the word 'seal.' When I got through, he said, 'Hand it here now,' and I handed it to him, and he put it on the book the same way." The witness goes on to say that he thinks, though he is not positive, that the scroll was there, and he only wrote the word "seal" within the scroll—that is, within a line merely drawn around on the paper next to the signature affixed to the deed; but the witness, Flegenheimer, who transcribed the deed upon the deed book of the clerk's office, testifies that when he did so, there was no seal or scroll affixed by way of seal, after the signature of Mrs. Burnette. When asked, "Did it have any line around it?" (referring to the line around the seal after the seal had been inserted) "or has that line been added since then?" his answer is that it had nothing at all after the name of Mrs. Virginia O. Burnette.

The court is of opinion that this evidence was admissible, and should not have been excluded from the consideration of the jury.

It is argued, however, that a seal or a scroll affixed by way of

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a seal to the signature of a grantor in a deed, is not necessary in this state to convey title to real estate. To sustain this proposition, we have no authority in the decided cases of this court.

Section 2413 of the Code provides: "No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will. \* \* \*

The learned counsel for defendant in error misapprehends the decision of this court in *Lewis v. Overby*, 28 Gratt. 627. The court there did not hold that when the seal was acknowledged in the body of the instrument, the paper was a sealed instrument, whether the scroll was affixed to the signature or not; but the point decided was, that when a paper, which, in the body of it says, "As witness my hand and seal," has the word "seal" affixed to the signature of the maker, it is a sealed instrument within the meaning of the statute. That is not the case here. While the deed in question concludes with the words, "Witness the following signature and seal," and plaintiff in error signed it, there was then no seal or scroll affixed by way of a seal to her signature; and according to the evidence which was excluded, it was not made to appear as a sealed instrument until after it had been transcribed upon the deed book in the clerk's office.

In giving the requisites of a deed in this state, 2 Min. Inst., p. 727, says: "It is requisite, seventhly, that the party whose deed it is should seal it," etc.

In *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347, it was clearly regarded as a matter of course that a seal is essential to a deed, although it was held that, in the case of ancient documents, where the seal might have been lost, it was a question of fact for the jury whether the instrument was sealed or unsealed.

In *Sup. of Washington Co. v. Dunn*, 27 Gratt. 615, the opinion by Staples, J., says: "A person who signs, seals and delivers an instrument as his deed, can never be heard to ques-



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tion its validity upon the ground that it was not acknowledged by him nor proved at the time of the delivery. It is the sealing and delivery that give efficacy to the deed, not proof of the execution." While this language of the learned judge may be considered as *dictum*, it is entitled to weight, as it clearly indicates that the court regarded that the sealing, as well as the delivery of a deed, was essential to its validity.

The case of *Pratt v. Clemens*, 4 W. Va. 443, is in point. In that case the instrument was a deed of trust, ending with "Witness the following signatures and seals;" but to the signatures of the signers there were no seals, or scrolls by way of seals, affixed, and, although in that shape, it was admitted to record, the court held that it was not a deed of trust—that is, that it was not sufficient to pass title to the land it purported to convey.

In Maine the statute on the subject is about the same as in this state, and in *McLaughlin v. Randall*, 66 Me. 226, the opinion says: "Two questions may be regarded as presented here. 1st, Can land in this state be conveyed by a written instrument without a seal? 2nd, Has a 'scroll' the effect of a seal? There can be no doubt that land in this State cannot be conveyed by an instrument without a seal. By the common law, the earliest and the latest, a seal is regarded as an essential part of a deed." See also Lomax Dig., 28; 2 Blackstone's Com., 305.

The court is of opinion that instruction "C," as asked for by plaintiff in error, was a correct instruction as to the law of this case, and the same should have been given instead of instruction No. 1, asked for by defendant in error.

For the foregoing reasons, the judgment of the circuit court will be reversed and annulled, and the cause remanded for a new trial, to be had in accordance with the views herein expressed.

*Reversed.*

## Statement.

## Wytheville.

## MITCHEL v. CITY OF RICHMOND.

June 13, 1907.

**MUNICIPAL CORPORATIONS—Streets—Leaving Sidewalks—Walking in Gutter—Negligence.**—A pedestrian who leaves a city sidewalk, which is neither obstructed nor in an unsafe condition, but merely wet, muddy and in a disagreeable condition to walk on, and walks in and along an adjacent paved gutter constructed for drainage only, and, without exercising ordinary care for his own safety, falls into a sewer inlet made in the gutter for the purpose of drainage, is guilty of such contributory negligence as bars any recovery against the city. The necessity for such inlets is a matter of common knowledge, of which every one must take notice, and the dangers of which they must guard against, even where they leave the sidewalk for sufficient cause.

**APPEAL AND ERROR—Reviewing Rulings on Immaterial Evidence—Correct Verdict.**—Where it appears that there was no sufficient reason for a pedestrian's leaving the sidewalk and walking in an adjacent paved gutter, and the jury have rightly so found under instructions from the court, this court will not undertake to review the rulings of the trial court in rejecting evidence offered by the plaintiff, as to the city's having repaired the place in the gutter where the plaintiff was injured, or that others had fallen into the same or similar openings in the gutter. As there could have been no other verdict rightly found than what was found, the proffered evidence was immaterial.

Error to a judgment of the Law and Equity Court of the City of Richmond, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

Isaac Diggs, W. A. Willroy and M. H. Omohundro, for the plaintiff in error.

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*Henry R. Pollard*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action was brought by Mrs. Elizabeth B. Mitchel, to recover damages from the city of Richmond, for injuries suffered by her while walking along one of the streets of the city.

It appears that the plaintiff and a companion, Mrs. Wingfield, started after night, April 28, 1904, to attend a church entertainment, several squares away from their home; that they walked down Grove Avenue until they came to Sycamore Street (one street above where the accident occurred), where they encountered a wet and muddy sidewalk, on which it was, as they considered, unfit for them to walk (Mrs. Wingfield, stating that she had on low-quarter shoes, and that the sand and gravel was so deep that it came into her shoes, and that there was water on the sidewalk), and finding it in this condition, they stepped from the sidewalk and undertook to walk in the granolithic gutter running along by the side of the sidewalk, and the plaintiff slipped and fell into a sewer opening in the gutter at the corner of Rowland street and Grove avenue, just as she was crossing Rowland street, whereby she received injuries for which she brings the suit.

The theory upon which plaintiff rests her right of recovery is, not that the negligence of the city in the construction of the granolithic gutter was the proximate cause of her injury, or that the sidewalk was obstructed or in an unsafe condition, but that the city had knowledge that the sidewalk was muddy, wet and unsuitable for pedestrians, while the granolithic gutter was smooth and nearly level, and not only suitable, but inviting for pedestrians; that for a long period of time previous thereto the city had allowed the sidewalk to remain in a condition unsuitable for persons to walk on, and had permitted and invited persons to walk in this gutter in preference to the sidewalk. therefore the city was answerable in damages to the plaintiff

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for the injuries of which she complains. In other words, the plaintiff does not allege that the sidewalk which she left was obstructed or in an unsafe condition, nor that the granolithic gutter, upon which she undertook to walk, was not properly constructed and suitable for the purposes for which it was intended, but that the city's negligence consisted in the improper construction of the sewer opening, and of permitting it to remain without change or alteration after it had notice of the dangerous condition and an opportunity to repair it.

As stated in the petition for this writ of error, when the case came to trial, the plaintiff insisted that she had the right to leave the sidewalk, if it was *unsuitable* to walk on, while the defendant city contended that she had no such right unless the sidewalk was *unsafe*; and after the evidence had been submitted to the jury, the court discarded the instructions asked for by the plaintiff and gave the following asked by the defendant as covering the single issue to be determined by the jury:

"The law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. The corporation is not required to have its streets or sidewalks so constructed as to secure absolute immunity from danger in using them, nor is it bound to employ the utmost care and exertion to that end. Those parts of a street usually located on either side of the driveway are commonly called sidewalks, and are intended to be used by pedestrians, and to which pedestrians should resort when passing along the street, unless for sufficient and reasonable cause, it becomes necessary to abandon the sidewalk for the purpose of crossing the street, or when the sidewalk is not in a reasonably safe condition for such use by pedestrians; and the court further instructs the jury that a pedestrian has no right to abandon the use of a sidewalk, which is in a reasonably safe condition for use, and use some other portion of the street without sufficient cause, as hereinbefore explained; and if, therefore, the jury believe from the evidence that the sidewalk on the north side of Grove avenue,

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along which the plaintiff was passing at the time of the accident, was in a reasonably safe condition for use by pedestrians, and that plaintiff abandoned its use and resorted to and used that part of the street known as the gutter, in lieu of the sidewalk, and that while so using and passing along said gutter, she slipped or fell into the sewer inlet, as in the declaration alleged, and thereby received the injury complained of, and that but for such abandonment of the sidewalk, and use of the gutter, the accident would not have happened, then she was guilty of contributory negligence, and is not entitled to recover in this case."

The verdict of the jury was for the defendant, and the sole question requiring our consideration is, whether or not the trial court erred in instructing the jury as to the law of the case.

After the case had gone to the jury, it became necessary for the court to respond to certain questions propounded by members of the jury as to the meaning or purport of the instructions that had been given them, and the oral answers to these questions are made the ground for an exception taken by the plaintiff. With reference to this exception, we consider it only necessary to say that the "oral instruction" in no way departed from the direct and plain statement of the law of the case contained in the written instruction.

The law is as well settled as to the duties of a municipal corporation to construct and maintain, in a reasonably safe condition, the sidewalks along its streets, for the use of pedestrians as it is with reference to keeping the roads and streets in like condition for the use of travelers in vehicles; but no authority is produced for the proposition that a pedestrian may leave a sidewalk, neither obstructed nor in an unsafe condition, but merely muddy, wet and in a disagreeable condition to walk on, and for an injury received in an attempt to walk in and along a gutter constructed for drainage only, recover damages of the corporation.

The rule of law laid down in the instruction of the court in

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this case is substantially as stated in sec. 1008, 2 Dillon on Mun. Corp., viz.: "The duty of a municipal corporation to keep the roads and streets in repair, extends as much to sidewalks for the use of pedestrians as to the traveled way for the use of carriages. When an ordinary public highway is out of repair, the public have a temporary right to go on the adjoining land for the purpose of travel. So sidewalks and street-crossings are constructed for the use of foot passengers; but if these happen to be obstructed, or to be in such a dangerous condition as to deter an ordinary prudent man from using them, then one may walk elsewhere. If he does so, however, without sufficient reason, and is injured, his injury cannot be imputed to the negligence of the city."

Accordingly it was said in *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37: "The general doctrine is that, whether one has been guilty of negligence or not is a mixed question of law and fact, to be determined by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, or the evidence is conflicting. But, inasmuch as instructions are predicated upon a hypothetical state of facts, when from the facts assumed, it is manifest that an ordinarily prudent person would not have acted in the manner supposed, it is the duty of the court to tell the jury, if they believe from the evidence that such conduct has been established, as a matter of law, it constituted contributory negligence and would defeat a recovery."

In that case the plaintiff came upon the sidewalk of the defendant city *en route* to her home, where the sidewalk was twelve feet wide, extending 212 feet in length, with an elevation of a little over three feet above the level of the street, and held in position by a perpendicular retaining wall, and without barriers or guard-rails to protect it. In stating, at the trial, her version of what occurred, the plaintiff said: "I did not think of anything. It was dark. I tried to go down the pavement when I came out of the gate; and I thought it would be a better

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way to get home to go out in the street, never thinking about there being any danger; and then I fell off the bank, just walked off it."

In *McLaughlin v. Dubuque*, 42 Ia. 539, a recovery was denied for injuries sustained by the plaintiff by reason of slipping on ice formed in the street gutter, and the opinion of the court says: "Sidewalks and cross-sidewalks alone are constructed for foot travelers, and he who, without some good and sufficient reason, walks elsewhere and is injured, should not be permitted to complain that he has been injured through the fault and negligence of the city."

The doctrine upheld in that case is re-affirmed in the later case of *Alline v. City of Lemars*, 71 Ia. 654, 33 N. W. 160, where it is said: "A pedestrian on a sidewalk, who voluntarily and without necessity steps from the walk without knowing that he can do so with safety, and steps in a hole near the walk and is thereby injured, is guilty of contributory negligence, and cannot recover of the city."

To the same effect is *Canavan v. City of Oil City*, 183 Pa. St., 611, 38 Atl. 1096, and a number of cases there cited, among which is *Seddon v. Brickley*, 153 Pa. 271, 25 Atl. 1104, where it is said: "Of course, gutters and curbstones are necessary in paved sidewalks in towns, but the mere fact that a foot passenger steps into one or stumbles over the other, whether by night or day, confers no right of action. There must be further affirmative proof of specific negligence in their construction before recovery can be had."

In the case at bar the plaintiff, as in *Winchester v. Carroll*, *supra*, left the sidewalk, not because it was obstructed or dangerous, but merely *unsuitable* to walk upon, concluding, in the one case, that a better way to reach her objective point was to walk in the street; and, in the other, to walk in and along the gutter. In her evidence the plaintiff makes the statement: "So, then we walked on this granolithic guttering because smooth and dry, never thinking about danger at all, because I

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had walked on it in different places. When I got to this corner, I didn't see this place at all. I wasn't thinking about harm, and I went in this hole." Mrs. Wingfield, her companion, when testifying as to the occurrence, was asked why they were not more particular when they saw the lamp-light was not burning, and said: "Well, I don't know. We were walking along, not thinking about anything of that sort, talking and walking along; we had been so far and it was all right, and I did not take any notice that the lamp was not burning until it was all over and we were discussing it there at Mr. Copeland's, and I noticed that the light was not burning."

It cannot be said that the plaintiff actually knew the location of the sewer inlet (necessarily a dangerous place) into which she slipped and fell, but it is a matter of common knowledge, of which she was required by law to take notice, that street gutters must necessarily have inlets to drain them. Not only did the plaintiff leave the sidewalk for an insufficient reason, but, after leaving it and attempting to walk in the gutter, according to her own showing, she did not exercise ordinary care for her own safety, and was, therefore, guilty of contributory negligence, which bars her right of recovery for the injuries of which she complains.

We are cited to a line of cases, including *Noble v. City of Richmond*, 31 Gratt. 271; 31 Am. Rep. 726; *Clarke v. Richmond*, 83 Va. 358, 5 S. E. 369, 5 Am. St. Rep. 281; *McCaul v. Manchester*, 85 Va. 584, 8 S. E. 379, 2 L. R. A. 691; *City of Richmond v. Smith*, 101 Va. 161; 43 S. E. 345; and others, as supporting plaintiff's contention in this case, that as the sidewalk in question was unsuitable for her to walk on, she had the right to leave it and walk in the gutter; but that line of cases has no application here. They are authority only for the proposition that it is the duty of a city to keep its sidewalks and crossings safe for pedestrians to walk on, and if injury result from the neglect of this duty, the party injured may recover damages of the city; and that rule of law applies



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where a party is injured from no fault of his, but the fault of the city in permitting its sidewalk to become obstructed or dangerous, necessitating pedestrians to walk elsewhere, even upon private property, where danger is encountered which was known or should have been known, by the city and guarded against. But that is not this case. Here the plaintiff left the sidewalk without sufficient reason, and the general result of her own testimony is, that, in attempting to use the gutter as a more desirable place to walk, she was not paying such attention as the situation required.

In our view of the case, sustained by a great weight of authority, whether the court below erred or not in rejecting certain evidence offered by the plaintiff as to the city's having repaired the place where she was hurt, that others had fallen in the same sewer inlet or similar openings in the gutters in that vicinity, etc., is immaterial, as there could have been no other verdict rightly rendered by the jury than they did render.

The judgment complained of must be affirmed.

*Affirmed.*

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**Wytbeville.**

## TAX TITLE CO. v. DENOON.

June 13, 1907.

Absent, Keith, P.

1. **EQUITY**—*Jurisdiction—Quieting Title—Who May Sue.*—Only those who have a clear, legal and equitable title to land, and are in possession thereof, can invoke the aid of a court of equity to give them peace, or dissipate a cloud on the title. If a person is out of possession but has the legal title, his remedy at law, by ejectment, is full, adequate and complete; if he has only an equitable title, he must first acquire the legal title, and then bring ejectment.

Appeal from a decree of the Circuit Court of Henrico county.  
Decree for complainant. Defendant appeals.

*Reversed.*

The opinion states the case.

*M. H. Omohundro* and *Isaac Diggs*, for the appellant.

*S. S. P. Patteson* and *W. H. Price*, for the appellee.

CARDWELL, J., delivered the opinion of the court.

The subject matter of this litigation is a lot of land, with improvements thereon, in Henrico county, within one of the suburbs of the city of Richmond, at the southwest corner of Washington and Winder streets, fronting twenty-five feet on Winder street, and extending back to an alley in the rear.

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The Tax Title Company, a corporation under the laws of the state of Virginia, on the 13th day of April, 1903, obtained a deed from the clerk of Henrico county for this property, as provided by section 666 of the Code of 1887, the property having been returned delinquent in the name of one George W. Martin and sold, as provided by law, to satisfy the delinquent taxes due thereon, and purchased by the Auditor of Public Accounts for the benefit of the commonwealth.

On April 25, 1903, H. L. Denoon obtained from one B. F. Hall the following contract of purchase of the said property: "In consideration of the sum of one dollar, and the conveyance of the property No. 809 North 28th street to L. W. Hall, I hereby grant and sell unto H. L. Denoon the property at southwest corner of Washington and Winder streets, fronting twenty-five feet on Winder street, and extending back to the alley in the rear, subject, however, to the two mortgages, one of \$700.00 and interest, dated April 19, 1893, and one of \$1,250.00 and interest, dated ..... And I hereby agree to convey said property to said H. L. Denoon or his assigns, when so directed by him, or he is hereby authorized to foreclose and sell said property under either of the above mortgages at his discretion."

In September, 1903, Denoon, claiming the property in question, by reason of the foregoing contract from Hall, the then owner, filed his bill in the circuit court of Henrico county, the purpose of which was to have removed the deed of the Tax Title Company aforesaid, as a cloud upon complainant's title to the property it covered, the bill alleging that the said tax title deed was not a valid deed for the reason that there was a certain deed of trust dated April 19, 1893, made by J. B. Blair and wife to C. L. Denoon, trustee, conveying the property in question to secure a debt of \$700.00, which deed had not been released, and the trustee therein had not been served with notice of the Tax Title Company's application to purchase the property, as required by law.

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The Tax Title Company filed an answer, denying each and every material allegation of the bill, the right of the plaintiff to recover in said suit, and that the deed of trust to C. L. Denoon was a lien upon the property, and setting forth at some length the chain through which it acquired title to the property.

Depositions were taken on both sides, and exhibits were filed in the record; and on the 11th day of July, 1906, the circuit court entered the decree complained of, appointing the clerk of Henrico county a special commissioner to mark on the margin of the deed book, where the deed of the Tax Title Company was recorded, that it was null and void, when the full amount of taxes, interest and penalties, amounting to \$64.34, had been deposited in bank to the credit of the court in the cause, and directing the cause to be removed from the docket. From this decree this appeal was taken.

The first question for consideration is, whether or not appellee (complainant in the court below) can maintain this suit in a court of equity to remove a cloud from his title. His title to the property, if any, which entitles him to maintain this suit, is by virtue of his contract of purchase from Hall, above set out, bearing date April 25, 1903, subsequent to the deed obtained by appellant for the property pursuant to section 666 of the Code. This contract does not purport to convey the property, but merely provides that Hall agrees to convey the property to Denoon, or his assigns, when so directed by him, or that Denoon might foreclose and sell the property under either of the mortgages mentioned in the contract, at his discretion. At most, the contract only vests in Denoon an equitable interest in the property, and, although he may be considered as in the possession thereof at the institution of this suit, the tenant of the property having attorned to him, the question still remains, whether, without the legal title, he could maintain this suit in a court of equity.

This court has repeatedly held, in a long line of cases, coming down to *Glenn v. West*, 103 Va. 524, 49 S. E. 671, that a court

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of equity cannot be invoked, in such a case as is made by this bill, either to give the complainant peace or to dissipate a cloud on the title to the property claimed by him.

Says the opinion in *Glenn v. West*, *supra*, after citing a number of pertinent authorities, "The doctrine is well settled that only those who have a clear legal and equitable title to land, with possession, have the right to claim the interference of a court of equity to give them peace, or to dissipate a cloud on the title. The person out of possession cannot maintain such a bill, whether his title is legal or equitable, for, if his title is legal, his remedy at law by action of ejectment is plain, adequate and complete; and if his title is equitable, he must acquire the legal title and then bring ejectment."

Among the authorities cited in the above named case is *Smith v. Orton*, 21 How. 241, 16 L. Ed. 104, where it was held that "An equitable interest in contestation may be the subject of a *bona fide* sale and transfer by deed, in the like manner that a mortgagor's equity may be sold and conveyed;" and that "after a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title." But an assignee of only an equitable interest in real estate cannot be heard in a court of equity to dissipate a cloud on the title.

In a still more recent case decided by the same court—*Frost v. Spitley*, 121 U. S. 552, 30 L. Ed. 1010, 7 Sup. Ct. 1129—the opinion says: "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of the real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff." A number of authorities are cited in support of this statement of the law, including *Orton v. Smith*, 18 How. 263, where it was said, as was said by this court in *Glenn v. West*, *supra*: "Those only who have a

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clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

In *Hitchcox v. Morrison*, 47 W. Va., 205, 34 S. E. 993, it is said: "Those only who have a clear legal and equitable title to land, connected with actual possession, have the right to claim the interference of a court of equity to give them peace or dissipate a cloud on their title."

Counsel for appellee cite us to some authorities supporting, as it would seem, the contention that the holder of an equitable title may maintain a bill to remove a cloud thereon, as he has no possible remedy at law; but these authorities are not only in conflict with the great weight of authority, but directly in conflict with our own decisions to which we have adverted.

The court being without jurisdiction to entertain the bill in this cause, it is unnecessary to consider other questions presented in the record.

The decree complained of must be reversed and such decree entered here as the lower court ought to have entered, dismissing the bill of appellee, without prejudice to his rights in such further proceedings as he may be advised to take in the premises.

*Reversed.*

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Statement.

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**Wytheville.**

BRAMMER'S ADMINISTRATOR v. NORFOLK & WESTERN RAIL-  
WAY Co.

June 13, 1907.

1. DEATH BY WRONGFUL ACT—*Action by Injured Party—Revival After Death—Final Judgment—Res Judicata.*—Under the Virginia statute giving a right of action for death occasioned by the wrongful act, neglect or default of another, but one action can be maintained to recover damages for an injury resulting in such death, as there is but one cause of action in such a case; and whether that action be brought by the injured party in his lifetime and revived after his death, or a new action be brought by the personal representative within the statutory period, as provided in the statute, only one recovery can be had, and that for the benefit of the next of kin named in the statute, where any such exist. If an action brought by the injured party in his lifetime be revived in the name of his personal representative after his death, and proceed to final judgment, it is a bar to any other action to recover damages for the same injury. The object of the statute was to give a right of action where none existed at common law, and to prevent an action from abating which would otherwise have abated, but not to allow two actions against the same defendant for the same injury.

Error to a judgment of the Circuit Court of Henry county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Hunt & Staples*, for the plaintiff in error.

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*Robertson & Wingfield and H. G. Mullins*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

M. L. Brammer, while driving in a wagon across the Norfolk & Western Railway tracks at a crossing in Henry county, Virginia, was struck by a locomotive, and, in addition to the killing of the team and the destruction of the wagon, he received personal injuries. He thereupon sued the railway company for injury to his person and property, but died pending that action. After his death the action was revived, under section 2906 of the Code, as amended by the Act of January 29, 1894, in the name of J. D. Short, his administrator, and proceeded in, in the circuit court, and afterwards in this court, to a final adjudication adverse to the plaintiff.

Before the final adjudication in that case, the present action was brought by the same plaintiff for the personal injuries to Brammer, resulting, as alleged, in his death, and at the hearing thereof, which was after the final adjudication in the first case, the defendant company tendered certain pleas of *res adjudicata*, which were sustained by the court below; and to that judgment this writ of error was awarded.

It is contended for plaintiff in error that the circuit court erroneously sustained the pleas of *res adjudicata* by resort to the doctrine of estoppel, and that, under sections 2902 and 2903 of the Code of 1887, the present action is maintainable on behalf of the widow and children of Brammer, independent of the right of action subsisting in Brammer at his death.

Section 2902 provides for the right of action in case of death in the following language: "Whenever the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, or of any ship or vessel, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action," etc.;



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and section 2903 is as follows: "Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased. \* \* \*" Section 2906, as amended by the Act of January 29, 1894, *supra*, is as follows: "The right of action under sections 2902 and 2903 shall not determine, nor the action when brought abate, by the death of the defendant, or the dissolution of the corporation, when a corporation is the defendant; and where an action is brought by a party injured for damage caused by the wrongful act, neglect or default of any person or corporation, and the party injured dies pending the action, the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative." It was under this last-named section that the action brought by Brammer in his lifetime was revived after his death, in the name of his administrator, plaintiff in error here, and was finally adjudicated in this court. *Brammer's Admr. v. N. & W. Ry. Co.*, 104 Va. 50, 51 S. E. 211.

The argument of the learned counsel for plaintiff in error, in support of the contention that this action is maintainable, notwithstanding it has been finally adjudicated adversely to the same plaintiff in another action against the same defendant to recover damages for the same cause, proceeds upon the theory that the purpose and effect of our statute, the prototype of which is "Lord Campbell's Act," is to create a new cause of action—in fact, two new causes of action—in all cases in which the injured party would have had a cause of action had not death ensued—the one for the benefit of the decedent's estate, and the other for the benefit of the relatives nominated in the statute; and decided cases cited from other jurisdictions, seemingly at least, afford support for this contention.

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*Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269, is also relied on, but it is manifest that what was said in the opinion is that case is misconstrued by counsel. The opinion does say, that the administrator bringing action under sections 2902-3, "sues wholly by virtue of the statute, and in respect of a different right. Where the right of action, which the deceased person had in his lifetime, survives, the personal representative sues as the regular owner of the personal estate \* \* \* and the recovery is for the benefit of \* \* \* the estate of the decedent. \* \* \* The right of action of the personal representative is the same that was possessed by the deceased in his lifetime. \* \* \* But very different is the right of action given by the act in question. The act requires the suit to be brought by and in the name of the personal representative, but he, by no means, sues in his general right of personal representative. He sues only by virtue of the statute in respect of a different right." And, further, "His suit proceeds on different principles. He sues not for the benefit of the estate, but primarily and substantially as trustee for certain particular kindred of the deceased, who are designated in the statute." But clearly the learned judge, who delivered the opinion, in the language used, was referring to the right of action where suit thereon could have been brought by the injured party in his lifetime, and which, upon his death, could be revived in the name of the personal representative, independently of sections 2902-3, on the one hand, and the right of action revived under section 2906, on the other. The only point decided in that case of interest here is, that an action to recover damages for personal injuries caused by the wrongful act, neglect or default of any person or corporation, must be brought within one year, and not five years, from the time such injury was inflicted.

At common law, the right of action, if any, which Brammer had against the defendant in error, with respect to personal injuries to him, would not have survived his death, and it is, therefore, only by virtue of the statute that the action he had

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brought in his lifetime could be revived, upon the suggestion of his death, in the name of his personal representative. In the case last above cited—*Anderson v. Hygeia Hotel Co.*,—no action had been brought by the injured party in his lifetime, and the recovery could only have been for the benefit of the relatives named in the statute. Indeed, no recovery in an action for damages for personal injuries caused by wrongful act, etc., whether the action is revived under section 2906, or brought after the death of the injured party by his personal representative under sections 2902-3, would be for the benefit of the decedent's estate, unless the conditions prescribed in section 2904 of the Code (1887) exist, which section is as follows: "The amount recovered in any such action" (action under sections 2902-3) "shall, after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent and child of the deceased, in such proportion as the jury may have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law."

Where the action brought by the injured party in his lifetime is revived, in the name of his administrator, after his death, or the action is brought under the statute after his death, the issue in either case is the same, the right of recovery resting upon the same state of facts, namely, the injuries resulting in death being caused by the wrongful act, neglect or default of the defendant. The plain meaning and intent of the statute, construing the sections which have been referred to together, as appears to us, is, to preserve a right of action, which, theretofore, would have been lost, where the injured party died after or before he had brought an action to recover damages for the wrongful act, neglect or default of another person or corporation, etc.

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Upon the death of Brammer, after having brought his suit, two courses were open to his widow and children under the sections of the Code, to which we have adverted. One was to revive the pending suit under section 2906, or abandon or dismiss that suit, and institute the suit authorized by sections 2902-3; but, in either case, the issue would have been the same, and the recovery for the benefit alone of the widow and children of Brammer, the conditions of section 2904 not existing. The course, by revival of the pending suit, brought by Brammer, was pursued, and the final adjudication in that case, as the learned judge below observes, that no right of action in Brammer existed at the time of his death, estopped the plaintiff in error from maintaining this action. In other words, when it was finally adjudicated, in the action which Brammer had brought, and which, after his death, was revived under the statute, that he was not entitled to maintain any action—that he had no right of recovery against the defendant—the right to maintain the second action did not exist. The adjudication that Brammer had no right of action at his death, as effectually determined the right to maintain this second action, as if payment to Brammer for his injuries had been made in his lifetime.

It would be an anomalous situation if the language used in our statute could be so construed, that, after a court of competent jurisdiction has ascertained, in a suit brought by a party himself, that the wrongful acts which constitute the sole foundation of any recovery against the defendant are not of actionable character, and that the injured person is not entitled to maintain an action by reason of them, or to recover damages on their account, other parties, in another and subsequent proceeding, may proceed to show, in an action for their benefit, founded upon the same alleged acts of the defendant, that at the time of the intestate's death, he was, as a matter of fact, the judgment of the court to the contrary notwithstanding, entitled to maintain an action against the defendant company, and to recover damages for the very acts in respect of which, recovery was

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denied the very man who suffered the injuries which resulted in his death.

As remarked, there are decided cases construing other statutes, which afford support for the contention of plaintiff in error; but it would prove unprofitable to review those cases, since, after all, this case must turn upon the construction of our own statute, which we feel constrained to give it.

In *Spiva v. Osage, &c. Co.*, 88 Mo. 68, an action for the wrongful death of plaintiff's intestate, the court said: "The right of action accruing to the widow under the statute, is such as would have existed in the husband's favor if death had not ensued, and none other, and as we hold the husband could not, under the evidence, have maintained the action if he had survived the accident, a recovery must be denied plaintiff upon the same ground."

In *Kauffman, Admr. v. Cleveland &c. Ry Co.*, 144 Ind. 456, 43 N. E. 446, another action for the wrongful death of plaintiff's intestate, it is said: "Such an action as this is merely statutory, and the statute that authorizes it does so upon the condition that the facts are such that the deceased might have maintained the action had he lived, for the injury resulting from the same act or omission."

In *B. & O. S. W. Ry. Co. v. Pietz*, 61 Ill. App. 161, the opinion of the court reversing a judgment in favor of the administrator, for the wrongful death of his intestate, upon the ground that the intestate had been guilty of contributory negligence, says: "She (the injured party) would be so barred, as the law is held in this state, had she survived the injury and sued on her own account, and necessarily her administrator, when suing for the benefit of the next of kin, must be barred also."

As suggested by counsel for defendant in error, if this action could be maintained, it could also be maintained, although Brammer, in his lifetime, by compromise or by recovery in an action for his injuries, had been compensated therefor.

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We are wholly unable to see anything in the provisions of the statute to warrant the conclusion, that, by it two actions against the same defendant for the same injuries are authorized, so as to give an action in favor of the administrator representing the estate, and also a second action in favor of the administrator representing the wife or children, or other beneficiary mentioned in the act.

In 13 Cyc. 327, citing a number of authorities, it is said: "While the authorities are by no means unanimous upon the point, the better doctrine seems to be that where one, in his lifetime, recovers damages for personal injuries, caused by negligence, and death subsequently results therefrom, his personal representatives or beneficiaries designated in the statute, are barred from recovery, under a statute giving them a right of action for death by wrongful act." And, further, "Likewise, where the plaintiff, in an action for personal injuries, dies from such injuries pending the action, and his administrator recovers judgment therein, such judgment is a bar to an action by the administrator or the beneficiaries for the death by wrongful act." In support of this last quotation, there are also a number of authorities cited.

There is a great weight of authority for the proposition that a judgment for damages for personal injury by the wrongful act or neglect of another, or where the injured party has received satisfaction in his lifetime for the injuries he sustained, is a bar to the action under the statute by the personal representative for damages by reason of the plaintiff's subsequent death. The real question here is, whether a judgment against the plaintiff in error, the administrator of Brammer, based on the finding of the court on the same issue of fact and law presented to it, is a bar to a subsequent action involving the same cause of action.

In our view of the statute we are considering, but one action can be maintained to recover damages for injury to a person caused by the wrongful act, neglect or default of another person

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or corporation, as there is but one cause of action in such a case; and whether that action be brought by the injured party in his lifetime and revived after his death, during the pendency of the action, in the name of his personal representative, or a new action be brought within the statutory period, as provided in the statute, but one recovery can be had, and that for the benefit of the next of kin nominated in the statute where they exist, as in this case; therefore, if there be a recovery in the action revived, or it be adjudicated in that action that the injured party had no right of action at his death, it is conclusive of the right to maintain another action to recover damages for the same injury.

It follows that we are of opinion that, in any view to be taken of this case, the judgment of the circuit court is right, and should be affirmed.

*Affirmed.*

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Statement.

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**Wytheville.****BEALE, MAYOR, & OTHERS v. PANKEY.**

June 20, 1907.

**CONSTITUTIONAL LAW—Amending Acts of Assembly—Title of Acts.—**

Where the title of an act declares it to be an act to amend and re-enact a prior statute, but the enacting clause makes no reference whatever to the act which is referred to in the title, and does not purport to re-enact and publish it at length, such amendatory act is void because of its failure to comply with section 52 of the Constitution, declaring that no law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title.

**MUNICIPAL CORPORATIONS—Dissolution.**—A municipal corporation is not dissolved by the nonuser or misuser of its franchise, or the failure to elect officers. The Legislature alone can dissolve such a corporation.

**MUNICIPAL CORPORATIONS—Amending Charters—Constitutional Provision—General Statute.**—Section 117 of the Constitution is self-executing in so far as it amends the charters of cities and towns so as to conform to the provisions of the Constitution; and the general law for the government of cities and towns, passed in pursuance of the Constitution, which provides that for all towns there shall be elected every two years a mayor and six councilmen, who shall constitute the council of the town, operates to amend a charter granted to a town prior to the Constitution, which provided for only five councilmen, one of whom should be chosen as mayor; and the official acts of a mayor and council elected pursuant to such general law, are valid and binding when done in pursuance of their charter powers.

Appeal from the Circuit Court of Appomattox county. De-  
ve for complainant. Defendant appeals.

*Reversed.*



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The title of the amendatory Act of 1906 is "An Act to amend and re-enact an act entitled an Act incorporating Pamplin City, Virginia, approved March 24, 1874, as amended by an Act entitled an act to amend and re-enact the third section of an act entitled an act incorporating Pamplin City, Virginia, approved March 31, 1875."

The body of the Act of 1906 makes no reference whatever either to the original act or the amendatory act referred to in the title, but proceeds at once with the enacting clause, as follows:

"Be it enacted by the General Assembly of Virginia, that the territory \* \* \* described in the second section of this act be deemed, taken and made a corporation by the name of Pamplin City, &c." The second section gives the boundaries of the town, and the remaining sections are devoted to a declaration of powers. The body of the act nowhere purports to amend and re-enact any previous statute.

*James H. Guthrie*, for the appellants.

*W. C. Franklin*, for the appellee.

CARDWELL, J., delivered the opinion of the court.

The town of Pamplin City, Virginia, was incorporated by an act of the General Assembly, approved March 24, 1874 (Acts 1874, p. 138) the title of the act being "An act incorporating Pamplin City, Virginia." The first section of the act declared that the town of Pamplin, in the counties of Appomattox and Prince Edward, as the same had been theretofore laid off into lots, streets, etc., should be and was thereby made a town corporate, by the name of Pamplin City, and by that name to have and exercise the powers conferred upon towns by the general laws then in force, or which might thereafter be passed, for the government of towns containing less than 5,000 in-

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habitants. The second section set out and defined the boundaries of the town. The third section provided that the officers of the town should consist of five trustees, who were to compose the council, etc., and certain persons named were to constitute the board of trustees, to hold their office one year, from the 1st of March, 1874, and until their successors were elected and duly qualified, according to law; and that, on the first Tuesday in February, 1875, there should be a regular election held for the election of officers of the corporation, and every two years thereafter. Said section further provided that the trustees should have power to pass all by-laws and ordinances for the government of the town that they might deem proper, not in conflict with the constitution of this state or of the United States, and also to provide for keeping streets in order, opening new streets, etc., and for other necessary improvements, for which purpose they might levy such tax, not exceeding 50 cents on the \$100 worth of property as they might deem proper, etc. The fourth section provided that the trustees should elect from their body a president, who should be the mayor of the town, and be vested with all the powers of a justice of the peace within the limits of the town, etc. The fifth and last section provided for the appointment by the councilmen of a town sergeant, and prescribed the duties and powers of that officer, among which was that he should collect all town taxes.

The trustees named in the charter duly qualified by taking the oath of office, respectively, as required by law, entered upon the duties of councilmen of the town, and continued to act as such until an election of their successors was held thereafter as provided by law. The councilmen chosen at the first and at subsequent elections entered upon the duties of councilmen and acted in that capacity for a number of years.

By an act approved March 31, 1875 (Acts 1874-5, p. 419), the third section of the original act of incorporation was amended, but this amendment is of but little importance here, as it only changed the time for the election of the successors of

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the trustees named in the original act, so that the election should take place on the fourth Thursday in May, 1875, and every two years thereafter.

By an act approved March 7, 1906, (Acts 1906, p. 90), the General Assembly again undertook to amend the charter of the town, the last mentioned act being entitled "An act to amend and re-enact an act entitled 'An Act incorporating the town of Pamplin City, Virginia,' approved March 24, 1874, as amended by an act entitled 'An Act to amend and re-enact the third section of an act incorporating Pamplin City,' approved March 31, 1875." Among other things, this last named act provided that, from and after the act went into effect, and until its councilmen and mayor, to be elected under its provisions, should have been so elected and qualified, R. L. Franklin, C. S. Morton, F. H. Lukin, L. N. Ligon, J. F. Connally and R. D. Baldwin were appointed councilmen, and R. W. Beale, mayor; how they might qualify; and that therefrom they should constitute the mayor and councilmen of said town of Pamplin City, Virginia, etc.

At an election held in the town of Pamplin City for mayor and six councilmen on the second Tuesday in June, 1906, in accordance with the general law then in force (sec. 1021, Code 1904), the said Beale was elected mayor, and the other six persons above named were elected councilmen of the town, and they respectively qualified as such on the 23rd day of June, 1906, and entered upon and continued to discharge the duties of their respective offices; the council electing one W. T. Johnson, sergeant of the town, who duly qualified as such by taking the oaths prescribed by law; one of his duties prescribed by the ordinance passed by the council being to "collect all taxes." The council, at a meeting held on the 25th day of June, 1906, levied a tax of 25 cents upon the \$100 worth of all property liable for taxation in the town, for the lawful purposes of the town. Among the persons against whom a tax was levied, was one P. P. Pankey, for the sum of \$1.97, an account for which

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was made out and placed in the hands of Johnson, sergeant, for collection, along with the accounts of other persons charged with taxes in the town. Johnson, the sergeant, proceeded to enforce the payment of the tax so levied; whereupon Pankey exhibited his bill against the mayor, councilmen and sergeant of the town, and obtained from the judge of the circuit court of Appomattox county an injunction restraining Johnson, the sergeant, from selling the property of the plaintiff, and the collection of the tax in the bill mentioned until the further order of the court.

The plaintiff attacked the validity of the tax against him, and the right to enforce its collection solely upon the ground that it was levied by virtue of the act of March 7, 1906, *supra*, and that said act is unconstitutional, null and void, in that it is an independent act, and not passed in conformity with the provisions of sec. 52, Art. 4, of the constitution of Virginia, which provides that no law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived or section amended shall be re-enacted and published at length.

To this bill, Beale, mayor, the six councilmen, and the sergeant of the town above mentioned, filed their joint answer, to which the plaintiff replied generally, which answer put in issue the constitutionality of the act of March 7, 1906, *supra*, and the validity of the tax levied against the plaintiff as above stated; and the cause coming on to be heard upon the bill and answer, affidavits filed in support of the averments of the answer, the record of the proceedings of the council, the certificates of the qualification by the mayor and members of the council, an agreed statement of facts, and a notice of a motion to dissolve the injunction theretofore awarded in the cause, the court, by its decree, entered in vacation, on the 21st day of March, 1907, held that the original charter of the town, approved March 24, 1874, as amended by an act of the General Assembly, approved March 31, 1875, had for a long time prior to the act of March

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7, 1906, been disused, and at the time of the passage of said last mentioned act, and for many years prior thereto, there was no town government for said town of Pamplin City; that it appeared that the so-called town government under which the tax complained of in the bill was levied, was organized under the act approved March 7, 1906; that the town of Pamplin City had no legal existence or authority whatever, unless it be by virtue of the act approved March 7, 1906; and that the said last named act is void by reason of its being contrary to section 52, Art. 4, of the constitution of Virginia, inasmuch as the act purports to amend the act of March 24, 1874, as amended by the act of March 31, 1875, by reference to its title alone, and in the enacting clause makes no reference whatever to the act which is referred to in the title, and does not purport to re-enact and publish at length the act as sought to be amended; whereupon, the motion to dissolve the injunction theretofore awarded in the cause was overruled. From this decree the defendants in the court below appealed to this court.

This court is of opinion that, for the reasons stated in the decree appealed from, the learned judge below was plainly right in holding the act of March 7, 1906, void. But we are further of opinion that it was error to hold that the town of Pamplin City had no legal existence or authority whatever to levy the tax complained of in the bill of appellee in this cause.

We have seen that the validity of the original charter of the town is not called in question, and that the organization of the government of the town was duly had under that charter: that a mayor and councilmen of the town were from time to time thereafter duly elected and qualified, pursuant to the provisions of the charter as amended by the act approved March 31, 1875; and that these officers acted in their respective capacities for a number of years.

It seems to be well settled that a municipal corporation does not go out of existence for nonuser of its charter, or by a surrender of its franchise.

## Opinion.

In 1 Dillon's Municipal Corporations, sec. 167, it is said: "Since all of our charters of incorporation come from the Legislature, a municipal corporation cannot dissolve itself by a *surrender* of its franchise. The state creates such corporations for *public ends*, and they will and must continue until the Legislature annuls or destroys them, or authorizes it to be done. If there could be such a thing as a surrender, it would, from necessity, have to be made to the Legislature, and its acceptance would have to be manifested by appropriate legislative action." In section 168 of the same work, it is said: "The doctrine of a *forfeiture of the right to be a corporation* has also, it is believed by the author, no just or proper application to our *municipal corporations*. If they neglect to use powers in which the public or individuals have an interest, and the exercise of such powers be not discretionary, the courts will interfere and compel them to do their duty. On the other hand, acts done beyond the powers granted are void. If private rights are threatened or invaded, the courts will, as hereafter shown, restrain or redress the injury. \* \* \* In short, unless otherwise specially provided by the Legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the Legislature, or pursuant to the legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but *dissolved*, when created by an act of the Legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision."

In 1 Beach on Pub. Corporations, sec. 118, the learned author declares, that "The power to dissolve a municipal corporation is vested wholly and exclusively in the legislative

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branch of our government." And in sec. 119, he says: "The American municipal corporation is simply and purely a strictly public corporation. It is a corporation of citizens, for citizens and by citizens. Its sole object is local government. Being maintained, therefore, only for the public advantage, it is manifestly unjust and even impossible that the charters of our municipal corporations should be forfeited by judicial proceedings. To give such a power to the judiciary would be to make them co-ordinate with the Legislature in their control of local government and local legislation. The illegal acts of municipal officials can be avoided and enjoined by various methods of judicial procedure, but the charter itself being the creature of the Legislature, can be destroyed only by the same power that created. We have seen that the power of the Legislature over municipal charters is unlimited except by constitutional limitations and by the power of the ballot-box. We may further add that this power of control has no rival, and that neither the judicial nor the executive departments of our government can create nor destroy a municipality, which is a subdivision of the State government. There are, to the knowledge of the writer, no cases in which this exclusive control of the Legislature has been successfully questioned." In support of this statement of the law, a number of authorities are cited, among others 1 Dillon on Munic. Corp., sec. 168. *supra*.

In 20 Am. & Eng. Ency. of L. (2nd ed.) p. 1236, under the head of "Nonuser or Misuser of Franchises—Failure to Elect Officers, Etc.," it is said: "The general rule is undoubted that a municipal corporation is not *ipso facto* dissolved by a nonuser or misuser of its franchises or a failure to elect officers. It has been held, indeed, that nonuser or misuser of the franchises of a municipal corporation is not even ground for a decree of dissolution by the courts, but the contrary has also been declared." In support of the law as thus stated, a number of decided cases are cited.

It is true that the original charter of the town of Pamplin

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City provides that the council shall consist of only five persons, and that the council should elect one of their number president, who should be mayor and be vested with all the powers of a justice of the peace within the limits of the town, but section 117 of the present constitution of Virginia provides, that "each of the cities and towns having at the time of the adoption of this constitution a municipal charter, may retain the same, except so far as the same shall be repealed or amended by the General Assembly; provided that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers as set forth in this article, or otherwise provided in this constitution;" and by section 1 of the schedule of the new constitution, it is provided that, "The common and statute laws in force at the time this constitution goes into effect, so far as not repugnant thereto or repealed thereby, shall remain in force until they expire by their own limitation or are altered or repealed by the General Assembly." The general law passed in pursuance of the new constitution for the government of cities and towns is found in Chap. 44 of the Code of 1904; and sec. 1021, a part of that chapter, provides, that in every town there shall be elected every two years, on the second Tuesday in June, a mayor and six councilmen; and that the mayor and councilmen shall constitute the council of the town.

It is clear, therefore, that by section 117 of the constitution, the act of March 24, 1874, incorporating the town of Pamplin City, as amended by the act of March 31, 1875, was amended so as to conform to the new constitution; and "Section 117 is self-executing so far as it \* \* \* amends the charters of towns and cities, so as to make them conform to the provisions of the constitution." *Hicks v. Bristol*, 102 Va. 861; 47 S. E. 1001; *Campbell v. Bryant*, 104 Va. 509, 52 S. E. 638.

The mayor and council of the town of Pamplin City, appellants here, having been duly elected and qualified in conformity with the provisions of the general law for the government of cities and towns in the commonwealth, are the duly and legally



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constituted government of the town until their successors be duly elected and qualified, and under the original charter of the town, as amended as before stated, the council is clothed with power to levy taxes within the limits prescribed in the charter; therefore, the tax here complained of, so far as this record discloses, is within the limits of the power of the council to levy, legal and valid, and its collection should not have been enjoined.

For the foregoing reasons, the decree appealed from must be reversed and annulled; and this court will enter such decree as the circuit court should have entered, dissolving the injunction awarded in the cause, with costs to appellants.

*Reversed.*

Syllabus.

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**Wytheville.**

**LOUISVILLE & NASHVILLE RAILROAD CO. v. INTERSTATE RAILROAD CO.**

June 20, 1907.

**1. RAILROADS—Connections—Powers of State Corporation Commission.—**

The State Corporation Commission may, under the powers conferred by section 1294d, sub-section 37 of the Code of 1904, establish as many connections between two railroads as may be reasonably necessary for the convenient interchange of traffic between such roads, and for the accommodation of said roads and the public. The section does not contemplate simply one connection at a suitable point. It is a remedial statute and should be liberally construed.

**2. RAILROADS—Connections—Findings of State Corporation Commission—**

*Case at Bar.*—The Constitution declares that the findings of the State Corporation Commission shall be deemed to be *prima facie* correct, but, without invoking that provision, the evidence in this case is ample to warrant the finding of the Commission that the connection established by it between the two railroads, which are parties to this proceeding, is reasonably necessary.

**3. RAILROADS—Connections—Taking of Property—Procedure.—Whether**

the crossing of the works of one railroad company by another is a "taking" within the meaning of the Constitution, cannot be determined in a proceeding before the State Corporation Commission to establish the right to cross. The right to cross, and the terms and conditions thereof, are to be first determined. After that is done, the rights of the parties can be determined upon appropriate proceedings before the proper tribunal.

**4. RAILROADS—Connections—State Corporation Commission—Appeal and**

*Error.*—Upon affirmance of an order of the State Corporation Commission, establishing a connection between two railroads, this court will leave it to the Commission, which has ample authority in the premises, to carry out its suggestions as to the manner in which the parties shall afford to each other proper facilities in their traffic relations.

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Opinion.

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Appeal from State Corporation Commission.

*Affirmed.*

*C. F. Duncan, Helm Bruce and H. L. Stone, for the appellant.*

*Rufus A. Ayers and Bullitt & Kelly, for the appellee.*

WHITTLE, J., delivered the opinion of the court.

This is an appeal by the Louisville & Nashville Railroad Company from an order of the State Corporation Commission granting the appellee, the Interstate Railroad Company, the privilege of making an overhead crossing above the appellant's tracks near Appalachia for its projected line of road to the town of Norton; and, for the purpose of effecting a connection between the two roads, authorizing the appellee to construct a spur or connection track from a point on the extension near the crossing to the western end of its proposed yard at Appalachia, to accommodate traffic between the two roads. The location of the connection track, and details for the junction, are shown by the order appealed from and a map prepared by the direction of the Commission, supplemented by certain suggestions for practical operation embodied in the order.

The appellant interposes no objection to the allowance of the overhead crossing, but insists, (1) That the Commission erred, as a matter of law, in granting a second connection between the two roads; and (2) That, as a matter of fact, the finding of the Commission, that the proposed connection was necessary, is not sustained by evidence.

The proceeding was had under sub-section 37 of section 1294d, Va. Code, 1904, which provides: "Any railroad company heretofore, or that may hereafter, be incorporated, and authorized to construct a railroad within the jurisdiction of

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this state, shall, when such railroad is constructed to any other railroad track, or the right of way of any other railroad being operated under the laws of this state, have the right to connect with such railroad in any county of this state at its own cost, at any suitable point that may be agreed upon between the chief engineers of the two railroad companies, and if the said engineers shall fail to agree, the State Corporation Commission may, after hearing evidence, decide the question in dispute and enter the proper order. But such connection, if made, and all costs and expenses of such operation and maintenance of such connection, including signals and other things deemed necessary by the company with which said connection is made, for the proper operation and protection thereof, shall be borne and paid by the company making such connection."

The first assignment of error involves the contention that the statute only contemplates one connection at a suitable point between the road of one railroad company with that of another; and, as there was already a connection between the roads at Pounding Mill Branch, near Appalachia, the powers of the Commission in that respect were exhausted.

Such is clearly not the correct interpretation of the enactment. On the contrary, being a remedial statute affecting the general welfare, it should receive a liberal construction in the interest of public traffic. It is plainly within the competency of the Commission to establish as many connections as may be reasonably necessary for convenient interchange of traffic and the accommodation of both roads and the public.

This brings us to the consideration of the second contention, namely, that, as a matter of fact, the connection in question was not reasonably necessary under all the circumstances of the case.

In approaching that inquiry it must be remembered that under section 156, clause f, of the constitution of Virginia, the finding of the Commission is *prima facie* correct, and all presumptions are, therefore, in favor of its action, and the burden is on

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the appellant to show that the wide discretion with which that tribunal is invested, has been erroneously exercised.

We are of opinion that, without invoking the foregoing rule, there is ample evidence to justify the action of the Commission in directing the additional connection. Two of the members of the Commission, in company with a competent civil engineer, visited the location, and on the ground investigated conditions. In the light of information thus acquired, the Commission heard the evidence and argument of counsel before coming to a conclusion. There was evidence tending to show that the facilities afforded by the connection at Pounding Mill Branch between the main line of the appellee's road and the spur track of the appellant were hardly adequate to meet existing demands; that the appellee was building, and had almost completed, the extension from Appalachia to Norton, and also a branch line up Roaring Fork, springing from the main line about midway between Appalachia and Norton, for the purpose of developing the rich coal fields tributary to those lines; and that it was not convenient, if indeed practicable, to utilize the present connection at Pounding Mill Branch for the necessary interchange of this new traffic with appellant's road. Upon the whole case, after painstaking investigation and mature consideration, the Commission rejected the prayer of the appellee for a main line connection with appellant's road near the throat of its yards at Appalachia, and adopted the alternative recommendation of the appellant, that if any connection was to be allowed at that point, it ought to be made with appellant's outlying side-track nearest to Powell's river.

In this state of the record, upon due consideration of the countervailing evidence adduced by the appellant in support of the competing theory that the connection was unnecessary, we can see no escape from affirming the order of the Commission.

There are minor questions demanding our notice. Thus, under the plan adopted by the Commission, the connection track

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to be constructed by the appellee will occupy, for part of the distance to be covered, the right of way of the appellant, which occupancy the latter company insists amounts to a taking of its property.

The language of the opinion of this court in the recent case of *N. & W. Ry. Co. v. Tidewater Ry. Co.*, 105 Va. 133, 52 S. E. 854, would seem equally applicable to this contention. "The object of this proceeding, as appears from Clause 3, section 1294b, of the Code, hereinbefore referred to, was to have the Corporation Commission determine the necessity for the proposed crossing, and the place where, and the manner in which, it should be made. Until those questions were finally settled, no question of taking property with or without due process of law, or of condemning the lands of the road, whose works were to be crossed, or of compensation therefor, could arise. When the plans, appliances and methods for the crossings are adopted by the Corporation Commission, or, if an appeal be taken from its action, upon the adoption of plans, appliances and methods for the crossing by this court, then it becomes the duty of the company desiring to cross to make the payment of proper compensation therefor before commencing work thereon; and that compensation, by the express terms of the statute under which this proceeding was had, is to be ascertained according to the laws regulating the exercise of the right of eminent domain. Whether crossing the works of one railroad company by another is 'a taking of property' within the meaning of that term under our laws of eminent domain, or what is the measure of compensation in such a case, could not be determined in this proceeding, because the Corporation Commission has no jurisdiction of those questions. Neither could these questions be settled by the court having jurisdiction thereof until the questions involved in this proceeding were ended, for until that time neither the location nor the character of the crossing would be known."

If condemnation proceedings were necessary in this instance

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(a question not involved in this appeal, and as to which we express no opinion), they could not be had until after the Commission had determined that the connection was necessary, and had outlined the place and manner of effectuating it. When this condition precedent has been accomplished, the rights of the parties can be determined upon appropriate proceedings for that purpose before the proper tribunal.

The appellee insists that we ought to amend and amplify the order so as to make the suggestions of the Commission, intended as a guide to the parties in affording proper facilities to each other, in their traffic relations, mandatory.

The Commission is clothed with ample authority by statute to deal with this subject; and should occasion require, would doubtless, on proper application, adopt such measures as might be necessary to render its order effectual.

On the subject of establishing connections between railroads, see *Jacobson v. Wisconsin &c., R. Co.*, 70 Am. St. Rep, 358, and notes; 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389.

For these reasons, the judgment of the Commission must be affirmed.

*Affirmed.*

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**Wytheville.**

NORFOLK & WESTERN RAILWAY CO. v. STEGALL'S ADMINIS-  
TRATRIX.

June 20, 1907.

1. INSTRUCTIONS—*No Evidence to Support.*—An instruction should not be given when there is no evidence in the case which tends to support it, as it simply misleads the jury, and thereby constitutes reversible error.

Error to a judgment of the Corporation Court of the city of Bristol, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

*Reversed.*

*Page & Fulkerson*, for the plaintiff in error.

*Wm. F. Rhea* and *J. S. Ashworth*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This case was before us upon a former occasion, was reversed upon a demurrer to the declaration, remanded for further proceedings, and is reported in 105 Va. 538, 54 S. E. 19.

The declaration was amended, and upon the trial, after the evidence was introduced, the plaintiff asked for instructions, and at her instance the court, among other things, instructed the jury that "one may not, by his own negligence or want of proper care, place another in a perilous situation, and, when sued for injuries resulting therefrom, put the burden on the plaintiff of showing that he acted with reasonable care. Per-



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sons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances."

Without discussing other instructions or expressing any opinion upon the tendency or weight of evidence in other respects, we are of opinion that there is no evidence before us which either proves or tends to prove that defendant in error's intestate was placed in a position of peril by any act of omission or commission on the part of the plaintiff in error. The instruction, therefore, as applied to the evidence, was misleading and erroneous.

The judgment must be reversed and the case remanded for a new trial to be had, not inconsistent with the views herein expressed.

*Reversed.*

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Syllabus.

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**Wytheville.****WATTS v. NEWBERRY AND OTHERS.**

June 20, 1907.

1. **EXECUTORS AND ADMINISTRATORS—Priority of Debts—Guardian De Son Tort.**—The wards of a guardian *de son tort* are not entitled, under Code, section 2660, to any priority over the general creditors of such guardian in the administration of his personal estate after his death. The language of that section plainly accords priority only where there has been a qualification, and that qualification has been in this State, and cannot be extended by construction.
2. **TRUSTS AND TRUSTEES—Tracing Funds.**—In order to recover a trust fund which has been misapplied by the person holding it in a fiduciary capacity, it must be clearly identified or distinctly traced into the property, chose in action, or fund, which is to be made the subject out of which the trust fund is to be replaced. It is not sufficient simply to trace a fund to the estate of the defaulting fiduciary.
3. **ATTORNEY AND CLIENT—Attorney's Lien.**—Attorneys have no lien upon property placed in their hands for a special purpose which is inconsistent with or adverse to the claim of such a lien.
4. **EQUITY—Court Commissioner Disbursing Funds—Taking Sides in Controversy.**—A commissioner appointed to disburse funds under the control of the court is the mere agent of the court. If doubts arise as to which creditor is entitled to payment, he may ask the advice and direction of the court, but he has no right to take sides in controversies over funds in his hands, or to aid any claimant in asserting his right thereto, and documentary evidence furnished by him to show that a particular creditor is not entitled to a fund, is no part of the record, and cannot be considered by the court in the determination of that question.
5. **TRUST AND TRUST DEEDS—Conveying Particular Interest—Inurement.**—The lien of a deed of trust on an undivided fifth interest in a tract

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of land, which is lost to the trust creditor by reason of a superior lien thereon, cannot be extended to a wholly different undivided tenth interest in the same tract which was not conveyed by the deed of trust, and, in fact, not owned by the trust grantor at the time the deed of trust was made.

Appeal from decrees of the Circuit Court of Tazewell county. A debt in favor of appellant was reported as a fiduciary debt and given preference in the report of the master. Another creditor excepted; the exception was sustained, and it was decided that appellant was not entitled to a preference, but that his debt stood on the same footing as other simple contract debts, unsecured. From these decrees this appeal was taken.

*Reversed in part.*

The report of Commissioner Chapman, and the exceptions thereto, referred to in the opinion of the court, are in the words and figures following, to-wit:

*"To the Hon. W. J. Henson, Judge of the Circuit Court of Tazewell county:*

"The undersigned commissioner in the chancery cause of Sue G. Hancock, who sues &c., vs. J. G. Watts' Ex. and *als.*, *trix et als.*, and J. S. & A. P. Gillespie against same, would respectfully report that, on February 21, 1907, he filed a report, showing certain funds in his hands, showing that of said funds \$615.20 arose from the sale of the property embraced in the trust deed from J. G. Watts and wife to A. P. Gillespie, trustee, to secure the Bank of Clinch Valley, and which had been reported as being due to H. Newberry as endorser, he having, as endorser, paid the debt secured by said deed to the bank.

"Your commissioner has been informed that, in addition to the proceeds arising from the sales mentioned in the report filed February 21, 1907, H. Newberry claims that he is also entitled,

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under said trust deed, to the proceeds arising from the sale of the one-tenth interest in the Nye Cove tract. Your commissioner does not think that H. Newberry is entitled to the proceeds from the sale of this one-tenth for the following reasons:

"The deed of trust to A. P. Gillespie, trustee, is dated the 28th day of March, 1895, and conveys one undivided fifth part of the 2,325 acres, known as the Nye Cove tract, and recited as being the same land purchased by J. G. Watts and others from W. A. French and others. At the time of the date of this deed J. G. Watts was the owner of one undivided fifth of this Nye Cove tract under deed from William A. French and wife and H. W. Straley to H. Newberry, J. G. Watts and others dated 28th day of August, 1890. Your commissioner files as part of this report a copy of said last mentioned deed, marked 'Deed No. 1.'

"It will be seen that a vendor's lien was reserved in this deed for certain purchase money. A suit was afterwards brought to enforce this vendor's lien in the name of H. W. Straley and others against H. Newberry and others, and the one-fifth interest of J. G. Watts in said land was sold under the proceedings in said suit and purchased by Douglas H. Smith, and was conveyed to him by J. W. Chapman, commissioner in said chancery cause, by deed dated 4th day of April, 1900. Said last mentioned deed is herewith filed as part of this report, marked 'Deed No. 2.'

"The price at which the J. G. Watts interest in the Nye Cove tract was sold to D. H. Smith was the balance due from J. G. Watts on his one-fifth interest in said Nye Cove tract, including interest and cost.

"In the case of H. W. Straley and others against H. Newberry and others, the one-fifth interest of William Mahone in the Nye Cove tract was also sold for the balance of purchase money due from him and secured by said vendor's lien, and J. G. Watts became the purchaser of this one-fifth. Mr. Watts, however, failed to pay for this one-fifth, and the purchase money

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for same was paid by H. Newberry and J. S. Gillespie, and under an agreement between J. G. Watts of the one part and Newberry and Gillespie of the other part, one-half of the Mahone fifth was conveyed to Newberry and Gillespie, and the other half thereof to J. G. Watts by deed, dated 4th day of April, 1900, and this was the interest owned by J. G. Watts at the time of his death and which was sold in this case. Your commissioner refers to the record in the case of H. W. Straley and others against H. Newberry & als, and to the reports and decrees in said case, which are in the clerk's office of your honor's court.

"Your commissioner will further state that he was counsel in the case of H. W. Straley and others against H. Newberry and others, and was the commissioner who sold the lands in the said case and made the deed to J. G. Watts for the one-half of the Mahone fifth.

"Your commissioner deemed it his duty to make a report of these facts as he knows them, and most respectfully asks your honor to determine to whom the proceeds arising from the sale of the one-tenth interest in the Nye Cove tract shall be paid.

"Respectfully submitted,

" J. W. CHAPMAN,

"Commissioner."

"Exceptions of H. Newberry.

"This supplemental report, and the consideration thereof by the court, is excepted and objected to, because liens and their order of priority are generally fixed prior to a sale of real estate or interests therein, and if not so fixed, they will not be subsequently fixed by supplemental report of commissioner appointed to sell said real estate made and filed with decree of court, directing him so to do, and providing for notice to be given to parties interested.

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"2nd. Because the report purports to furnish documentary and other evidence to be considered by the court, and evidence cannot be introduced in a cause in this way.

"3rd. Because the question raised by said supplemental report, and by the exceptions to said commissioner's former report filed during this term, can only be decided upon the record of these causes, as it stood when report of liens, made by Commissioner Royall, was confirmed.

"4th. It being averred in bill of complainant in the cause of Sue G. Hancock, who sues &c., vs. J. G. Watts' Ex. and *als.*, that the one-tenth interest of J. G. Watts in the Nye Cove 2.325 acres of land was embraced in the deed of trust to A. P. Gillespie, trustee, and this averment nowhere being denied by pleading or proof, and report of Commissioner Royall having been confirmed as to debt reported in favor of H. Newberry and said one-tenth interest in said Nye Cove land being sold to H. Newberry, and sale thereof confirmed, it is now too late, by supplemental report or otherwise, to attack the prior lien in favor of H. Newberry upon the proceeds of sale of J. G. Watts' interest in said Nye Cove land."

*Chapman & Gillespie*, for the appellant.

*Wm. H. Werth* and *S. M. B. Coulling*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The first assignment of error presents the question, whether or not, in the payment of the debts of John G. Watts, deceased, out of the assets in the hands of his personal representative, priority is accorded by law to the debt owing by the said decedent as guardian *de son tort* of the appellant, R. Bowen Watts, the assets being insufficient to discharge all of the debts.

Section 2660 of the Code provides that, where the assets of a decedent, in the hands of the personal representative, after the

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payment of funeral expenses and charges of administration, are not sufficient for the satisfaction of all demands against him, they shall be applied as follows: First, to the claims of physicians and certain other named classes of persons for services rendered and articles furnished during the decedent's last illness, not exceeding fifty dollars to any one class of the persons named; Second, to debts due the United States and this state; Third, to taxes and levies assessed upon the decedent previous to his death; Fourth, to debts due as trustee for persons under disabilities, as receiver or commissioner under a decree of court of this state, as personal representative, guardian, or committee, where the qualification was in this state; Fifth, to all other demands except those in the next class; and, Sixth, to voluntary obligations.

It will be observed that the priority provided for by the fourth clause of section 2660 against the estates of guardians is limited by its language to guardians who qualify in this state. It is insisted, however, that the purpose of the Legislature in using that language, was to make a distinction between a guardian who qualified in this state and one who qualified in a foreign jurisdiction, and to give to the wards of the former class of guardians additional protection, and that it never could have been the intention of the Legislature to leave the wards of a *de facto* guardian in this state without a like protection.

Conceding that there is no reason why the wards of a guardian *de son tort* and of a guardian who qualified in this state, should not have the same right of priority in the distribution of their guardian's estate, the question is, does the statute give them such right?

In the case of *Price, &c. v. Harrison, &c.*, 31 Gratt. 114, 117, which arose before the amendment to the statute now under consideration, giving priority to debts due from trustees to persons under disabilities, it was argued that such persons were within the spirit or equity of the statute and should have the priority accorded by it, although they were not within the

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letter. In reply to that contention, it was said by Judge Burks, in delivering the opinion of the court, that, "In the construction of statutes, the primary object is to discover the intention of the Legislature, and where that intention can be indubitably ascertained, the courts are bound to give it effect, whatever they may think of its wisdom or policy. Where the language is free from ambiguity and the intention plainly manifested by it, there is no room for construction." "There is always danger," he continues, quoting from Lord Tenderden, "in giving effect to what is called the equity of a statute; it is much safer and better to rely on and abide by the plain words, although the Legislature might have provided for other cases had their attention been directed to them." *Brown v. Lambert*, 33 Gratt. 256, 267-8; *Suth. on Stat. Constr.*, sec. 415.

Applying these rules of construction to this case, it is clear, we think, that the statute does not embrace the wards of a guardian *de son tort*. The only guardian whose estate is subject to such priority is one who has qualified as such, and whose qualification was in this state. We are no more at liberty to disregard the requirement that he has been appointed guardian—for his qualification implies this—than we are to disregard the requirement that his qualification must be in this state.

It is insisted that the appellant, R. Bowen Watts, was entitled to have priority in the payment of his debt over the general creditors of the decedent's estate, because "the funds or estate represented by the recovery never belonged to the decedent, and upon his death, did not constitute a part of his estate, but had, by his wrongful act, become mingled with his other property."

The record, as we understand it, does not identify any part of the funds in the hands of the personal representative or under the control of the court, arising from the sale of the decedent's lands, as the property of the appellant, which went into the hands of his guardian, nor is it shown that said funds



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embrace the proceeds of such property or any part thereof. They may do so, but the evidence fails to show it.

There are some cases cited by appellant's counsel which hold that, in order to give a preference to the beneficiary of a trust estate, which has been dissipated by the person holding it in a fiduciary capacity, it is not necessary to trace the trust fund into some specific property, but it is sufficient if it can be traced into the estate of the defaulting fiduciary. The better doctrine, as it seems to us, and that sustained by the weight of authority, is that, in order to recover a trust fund which has been misapplied by the person holding it in a fiduciary capacity, it must be clearly identified or distinctly traced into the property, chose in action, or fund, which is to be made the subject out of which the trust fund is to be replaced. See *Nat'l Bk. v. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693, and cases cited; 3 Pom. Eq. Jur. (3rd. Ed.) secs. 1047, 1048, note "f," and cases cited, and secs. 1079, 1080; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 34 Am. St. Rep., 463, 20 L. R. A. 566; *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221.

The next question to be considered is whether or not the trial court erred in holding that the attorneys of John G. Watts had an attorney's lien on certain drafts payable to the order of said Watts, in their hands at the time of his death.

A short time before the death of Mr. Watts, he deposited in a bank in Tazewell county several thousand dollars, the proceeds of the sales of lands or interest in lands owned by him, lying in the state of West Virginia. After making the deposit, he consulted with two firms of attorneys, who had been his counsel for some time, as to the best method of preventing the money deposited in bank from becoming involved in a suit with his wife and her sons by a former marriage and tied up, as his other property then was, in order that the fund in bank might be under his personal control, to be applied by him to the payment of such of his debts as he thought proper. "They ad-

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vised him," as stated in their answer, "to put the money in New York drafts, where it would not be subject to garnishment or attachment proceedings, so that he could at any time realize the money on the drafts and apply it to the payment of such debts as he thought best." This advice he acted upon and secured three drafts, one of which he deposited with one firm of attorneys, and the other two drafts with the other firm. The drafts remained in the possession of his attorneys until Mr. Watts' death, which was unexpected and very soon afterwards. They continued to hold them after his death and until after this suit was brought, awaiting proper legal direction as to what disposition should be made of them. At the time of Mr. Watts' death, he was indebted to both firms for professional services rendered him, a part of which was for advice given him concerning the management of the funds mentioned. Both firms claimed an attorney's lien on the drafts respectively held by them for all the fees due them. The court required the drafts to be delivered to the personal representative of the decedent's estate, but without prejudice to the lien claimed by the attorneys. The debt due one of the firms was settled or adjusted after the filing of their answer, and the claim of the other firm alone is involved in this appeal.

The right of the attorneys to a lien on the drafts in their hands for their fees or any part thereof, is denied by the appellant, upon the ground, first, that the advice given the decedent was to enable him to conceal his property from his creditors, which was not such advice as they had the right to give, and the drafts were, therefore, not placed in their hands in the course of professional employment; and, second, that the deposit of the drafts with them was made for a specific purpose, which is inconsistent with the claim of a lien.

In the view we take of this assignment of error, it is unnecessary to consider the question whether or not the drafts came into the hands of the attorneys in the course of their professional employment, for, if it were conceded that the drafts were

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deposited with the attorneys in the course of professional employment, it is clear, we think, that they were placed in their hands for a special purpose, inconsistent with the claim of a lien.

The object of placing the drafts in the hands of the attorneys, as stated by them in their original and amended answers, was to enable the client at any time to realize the money on the drafts and apply it to the payment of such debts as he thought best. The action of the client in depositing the drafts with his attorneys, as they had advised, for that express purpose, is inconsistent with the claim of lien now asserted by his attorneys. Their debt might not be, and most probably was not, one of the debts which he intended to pay out of the money deposited in bank. If it had been, he would very likely have given his attorneys a check in payment of their debt and obtained drafts for the residue only. If their debt was not one of the debts which he, in his then financial condition, thought it "best" to pay out of the proceeds of the drafts, he would be compelled to submit to the demand of his attorneys or have the whole purpose for which he deposited the drafts in accordance with their advice thwarted.

That an attorney has no lien upon property placed in his hands for a special purpose, which is inconsistent with or adverse to the claim of a lien, see *Anderson v. Bosworth*, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910; *Weeks on Attorneys*, sec. 371; 4 Cyc. 1016; *Ex parte Pemberton*, 18 Vesey 281; *Walker v. Birck*, 6 Term. Rep. 258, 262.

The remaining assignment of error is to the action of the court in sustaining the exception of H. Newberry to the reports of Commissioner Chapman, and holding that the proceeds arising from the sale of the one-tenth interest in the Nye Cove tract of land should be paid to H. Newberry.

One of the exceptions to Commissioner Chapman's report is that it purported to furnish documentary and other evidence, to be considered by the court in passing upon the question, upon which he asked the court's instructions.

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A commissioner of a court, in making sales, collecting the proceeds of such sales, and paying the same out under the orders and decrees of the court, is the mere agent of the court. His duty in paying out the money collected from such sales is to pay it out as directed by the court. If he has doubt about which creditor is entitled to payment, he has the right to ask the court to construe its decrees and make clear what his duty is; but he has no right to take sides in controversies over the fund in his hands, or aid any claimant in asserting his right thereto. The exhibits filed with Commissioner Chapman's report to show that H. Newberry did not have a lien on the one-tenth interest in the Nye Cove tract of land purchased by John G. Watts in the case of *Straley and others v. Newberry and others*, were not, therefore, properly a part of the record, and could not be looked to in passing upon the question whether or not H. Newberry had a lien on the proceeds of the sale of that interest.

The report made in the case, ascertaining the liens and their priorities, and which was confirmed by the court, finds that John G. Watts conveyed certain property in trust to secure the payment of the debt asserted by Newberry. Among the property so conveyed was "one undivided fifth of that certain tract of land containing 2,325 acres, lying in Tazewell county, known as the Nye Cove land, and being the same land purchased by John G. Watts and others from W. A. French and H. W. Straley." The one-tenth undivided interest in the same tract of land, and upon the proceeds of which Newberry claims to have a lien by virtue of the said deed of trust, was not owned by Watts when the deed of trust was executed. That one-tenth interest was one-half of the undivided interest of William Mahone in the Nye Cove tract of land, and was purchased by Watts subsequently to the execution of the deed of trust at a judicial sale made in the cause of *Straley and others v. Newberry and others*.

While the undivided one-fifth interest purchased by Watts

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from French and Straley and the undivided one-tenth interest purchased by Watts at the sale made by the court, are parts of the Nye Cove tract of land, they are wholly distinct interests. Conceding, as was stated in argument, and not denied, (though that fact does not clearly appear by the record), that the said undivided fifth interest embraced in the deed of trust was subject to a lien for the purchase money due French and Straley, and that it was sold to satisfy that lien, so that it was wholly lost as a security for Newberry's debt, we know of no rule of law that would extend the lien of the deed of trust to another and wholly distinct interest in the land subsequently acquired by Watts. If the interest subsequently acquired by Watts had been a part of the interest conveyed by the deed of trust, although that instrument contained no warranty of title, it may be that, under the decisions of *Nye v. Lovitt*, 92 Va. 710, 717, 24 S. E. 345; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710; 5 Am. St. Rep. 317; *Burtner v. Keran*, 24 Gratt. 42, and *Doswell v. Buchanan*, 3 Leigh 365, 23 Am. Dec. 280, it would have inured to the benefit of the deed of trust creditor; but, upon this question we express no opinion, as it is not involved in this case.

We are of opinion that the decree complained of should be affirmed, except in so far as it holds that the decedent's attorneys had a lien on the drafts in their hands for the payment of their fees; and in so far as it holds that H. Newberry was entitled to the proceeds of the sale of the decedent's one-tenth interest in the Nye Cove tract of land, it should be reversed. As to those claims, the decree must be reversed and set aside.

*Reversed in part.*

## Statement.

## Wytheville.

PRESTON AND OTHERS v. VIRGINIA MINING CO.

June 20, 1907.

*ION—Nature of Estate to be Divided—Equity Jurisdiction.*—  
 ere a party in possession of a tract of land claims, under a title  
 amount in time and wholly distinct from and hostile to the title  
 another party, who claims an undivided interest in the land  
 ler a subsequent grant from the commonwealth, the parties are  
 her tenants in common, joint tenants, nor co-parceners, and a  
 rt of equity is without jurisdiction to decree a partition of such  
 d.

*E POSSESSION—Color of Title—Deed from One Tenant in Com-*  
*mon.*—A stranger who takes a conveyance of the whole es-  
 e in a tract of land, and, in pursuance thereof, enters into  
 exclusive possession thereof, claiming title to the whole,  
 occupies, uses and enjoys the same adversely, openly, and  
 oriously for the statutory period, acquires title to the whole  
 d, although the grantor may have owned only an undivided in-  
 est therein. He is not a tenant in common with others who owned  
 land jointly with his grantor, and they cannot maintain a suit  
 equity against him for the partition of the same.

al from a decree of the Circuit Court of Carroll county.  
 for defendants. Complainants appeal.

*Affirmed.*

pinion states the case.

& Penn and W. D. Tompkins, for the appellant.

. Bolen and Archer A. Phlegar, for the appellee.

uson, J., delivered the opinion of the court.

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This suit was instituted for the purpose of having partition of two small tracts of land of ten acres and a fraction each, lying a mile or more from each other in the county of Carroll, and within a large boundary of land owned by the appellee mining company. The circuit court held that the defendant mining company was not a tenant in common, joint tenant, nor co-parcener of the plaintiffs, and that a court of equity was, therefore, without jurisdiction to make partition of the two tracts of land in dispute. The bill was, therefore, dismissed, but without prejudice to the rights of the complainants to institute such action at law as they might be advised to test their right and title to any portion of the two tracts of land in controversy.

The claim of the appellants to be tenants in common with the appellee rests upon two separate grants, dated April 1, 1856, each for ten and a fraction acres, to Lorenza D. Blair. Martin W. Leonard and Lewis Starr, Blair taking a one-third interest and Leonard and Starr a two-thirds interest. Blair never parted with his interest in these two grants in his lifetime, and the same descended to his heirs at law. John F. Preston, through successive alienations, became the owner of the Leonard and Starr two-thirds interests, and died, leaving a will devising this interest in these grants, together with other property, to his wife, Jane M. Preston, who died intestate, and the appellants are her heirs at law.

The appellee claims title under the Rustin grant, bearing date in 1785, long anterior to the two grants of ten acres and a fraction each now in dispute. By deed dated September 2, 1889, The Rustin Land, Mining and Manufacturing Co. conveyed to A. J. Dull a number of tracts of land, including the two parcels in controversy, each of which is described by metes and bounds, and all lying contiguous to each other. After Dull had taken this deed, the heirs of L. D. Blair, one of the patentees under the grants of 1856, asserted a claim to five parcels of the land lying within the boundary which had been conveyed

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to Dull. In order to avoid litigation and quiet his title, Dull bought the claim of the Blair heirs, and took from them a deed, dated November 12, 1889, to the five parcels, which included a conveyance by metes and bounds of the two ten-acre tracts in controversy; and on the 25th of the same month Dull conveyed all of these lands, including the two ten-acre tracts in question, to the appellee mining company.

These recitals show that the claim of the appellee to the land in controversy is under the Rustin survey, a title paramount in time, and wholly distinct from and hostile to that under which the appellants claim. This being so, the appellee does not bear to the appellants the relation of tenant in common, joint tenant, or co-parcener, and a court of equity has no jurisdiction to entertain this suit for a partition of such lands.

The evidence shows, as heretofore stated, that the purpose of the appellee in obtaining from the Blair heirs the deed of November 12, 1889, was to avoid litigation and quiet the title already acquired by it from the Rustin Mining and Manufacturing Co. It is, however, contended that the possession by the appellee of the land in dispute must be referred to the title which it has under the deed from the Blair heirs, because that title is consistent with the claim of the appellants to be tenants in common.

It is sufficient to say in reply to this contention, as to which we express no opinion, that if it were to prevail, the result would be the same to the appellants; for it satisfactorily appears from the evidence that A. J. Dull, the grantor of the appellee, was in possession of the land in dispute on November 12, 1889, when the deed was made to him by the heirs of L. D. Blair, conveying, together with other lands, the whole of the two ten-acre tracts by metes and bounds, and that he continued in possession until the 25th of November, 1889, when he conveyed, by metes and bounds, the entire body of land he had purchased, including the two parcels in dispute, to the appellee. It further clearly appears from the evidence that from and



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since the date of its deed, in November, 1889, the appellee has been continuously in the open, notorious and adverse possession of the boundary of land acquired by it, actively engaged in developing the minerals upon the land, and in a variety of ways multiplying the evidences of its possession and ownership. This suit was brought February 22, 1900, more than ten years after the date of the deed executed by the heirs of L. D. Blair, and more than ten years after the open, notorious, continuous and adverse possession of the appellee had begun. Inasmuch as the appellee was a stranger at the time it took a conveyance of the whole of the land in dispute and entered into exclusive possession under such conveyance, claiming title to the whole, it has the right to rely upon its adversary possession, and is not a tenant in common with the appellants. *Johnston v. Va. C. & I. Co.*, 96 Va. 158, 31 S. E. 85.

The court, therefore, had no jurisdiction to entertain this suit for partition, and the bill was properly dismissed.

These conclusions make it unnecessary to consider other assignments of error.

The decree appealed from must be affirmed.

*Affirmed.*

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Statement.

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**Wytheville.****MILLER v. FERGUSON AND OTHERS.**

June 20, 1907.

1. PARTNERSHIP—*Purchase and Sale of Land—Statute of Frauds—Evidence.*—A partnership for the sale and purchase of land for speculation, the profits to be divided among the partners, is valid when verbally made, and the existence of the partnership and the extent of the interest of the partners may be shown by parol.
2. PARTNERSHIP—*Good Faith—Disclosures—Case in Judgment.*—The evidence in this cause shows the existence of a partnership between the appellant and the appellees to purchase a designated piece of real estate for speculation, and that, while the relations of the parties called for the utmost good faith and fair dealing between them, the appellees, after availing themselves of appellant's plan to acquire the property, eliminated him as a possible competitor for it, carried on negotiations behind his back, and withheld from him information of the gravest importance, vitally affecting his interest, and acquired the property for themselves. Upon the plainest principles of equity and fair dealing, the appellant is entitled to participate in the profits arising from the transaction.

Appeal from a decree of the Circuit Court of Wythe county.  
Decree for defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*Scott & Buchanan*, for the appellant.

*Robertson, Hall & Woods*, and *Robertson & Wingfield*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

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In October, 1904, the appellant, Thomas W. Miller, entered into a parol agreement with two of the appellees, S. C. Ferguson and J. R. Terry, for the acquisition of 7.57 acres of land in the city of Roanoke, known as the "Miller Hill" property, upon the stipulations that the two latter were to supply the purchase money, and the land, when bought, was to be conveyed to one of the real estate corporations controlled by them, to be divided into lots and sold, and, after defraying expenses and refunding the purchase price with interest, the net profits arising from the sale were to be shared equally by Miller, Ferguson and Terry. Having obtained contracts for the purchase of the property, Ferguson and Terry denied Miller's right to participate in the profits, and procured the title to be conveyed to the Highland Company, Incorporated; whereupon, Miller instituted a suit in equity to establish the partnership agreement and enforce its provisions.

The defendants, Ferguson and Terry, demurred to the bill, and filed a plea of the statute of frauds; and also by separate answers, denied the existence of the partnership and liability on the agreement.

The circuit court overruled the demurrer and rejected the plea, but, on final hearing, dismissed the bill, and the plaintiff appealed.

We are of opinion that the preliminary question raised by the demurrer and plea was rightly decided by the trial court. The doctrine established by the weight of authority on the subject, both in England and in this country, is summed up in 29 Am. & Eng. Ency. L., pp. 897, 898, as follows: "It is well settled that a partnership for the purchase and sale of land for speculation, the profits to be divided among the partners, is valid when verbally made, and the existence of the partnership and the extent of the interest of the partners may be shown by parol."

The principle that the statute of frauds has no application to such an agreement, is placed by some of the leading cases

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on the ground that when land is acquired and held for partnership purposes, it is considered personalty as between the partners and creditors of the firm, and also between the surviving partner and the representative of a deceased partner.

In the case of *Dale v. Hamilton*, 5 Hare 368; the court observes: "The plaintiff, however, has relied upon another ground for taking the case out of the statute. He says that when a partnership, or an agreement in the nature of a partnership, exists between two persons, and land is acquired by the partnership as a substratum for such partnership, the land is in the nature of the stock in trade of the partnership; and that the partnership being proven as an independent fact, the court, without regarding the statute of frauds, will inquire of what the partnership stock consists, whether it be of land or of property of any other nature." The court then, after reviewing the authorities, says: "The principle upon which I presume the above cases have proceeded, has been partly the jurisdiction of the court in cases between partners touching the partnership property, and partly its jurisdiction to relieve against the fraud of a partner, who should avail himself of his legal right in violation of his partnership contract, a fraud as against which no remedy, or no adequate remedy, could be had at law."

The decisions of this court are entirely in accord with the prevailing doctrine.

In *Pierce's Admr. v. Trigg's Heirs*, 10 Leigh 423, 439, the court observes: "I think then, the doctrine laid down in *Gow on Partn.* 51, and 3 *Kent's Comm.* 37, may now be taken as settled in England, namely, that real estate purchased for partnership purposes, with partnership funds, and used as part of the stock in trade, is to be considered to every intent as personal property, not only as between the members of the partnership respectively, and their creditors, but also as between the surviving partner and the representatives of the deceased." *Canada v. Barksdale*, 76 Va. 889; *Brown v. Brown*, 77 Va. 619, 629; *McCully v. McCully*, 78 Va. 159; *Taylor v. Taylor*,

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88 Va. 529, 532; 14 S. E. 325; *Derring v. Kerfoot*, 89 Va. 491, 493, 16 S. E. 671; *Jones v. Murphy*, 93 Va. 654, 24 S. E. 825; *Williams v. Kendrick*, 105 Va. 791, 54 S. E. 865.

The case of *Jones v. Murphy*, *supra*, is identical in principle and strikingly analogous in its essential features to this case. It upholds the jurisdiction of the court of equity, and is likewise conclusive on the point that this class of contracts is not within our statute of frauds.

On the merits of the case, we have examined the entire evidence with much care, and it may be affirmed that it sustains the following findings: In October, 1904, the appellant, Miller, a lawyer who had established an office for examining and supplying abstracts of titles, entered into a partnership agreement with Terry and Ferguson, who were dealers in real estate, the latter being also a private banker and capitalist, for the purchase of the "Miller Hill" property, with the understanding that, in the event of a purchase, the price was to be paid by Terry and Ferguson, and the legal title lodged in one of the land companies under their control; that the land should be laid off in lots for sale, and the net proceeds, after refunding the purchase money and expenses, were to be equally divided among the three partners. It is true, that both in their answers and depositions the defendants insist that Miller (who, it is admitted, suggested the project, though the defendants say it had previously occurred to them) represented to them as a fact, and not merely as an expression of opinion, that he could buy the property at \$6,000, and that his right to participate in the profits was predicated on his fulfilment of that assurance. The statement is, however, positively denied by Miller, and is not sustained by the testimony of the defendants. Miller did express the belief that the land could be secured at even less than \$6,000; at the same time, he made full disclosure of the extent of his information and negotiations, which fully advised the defendants that he had agreed upon no price, and had acquired no contractual rights from the owners, and that his

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s of value were nothing more than expressions of expectation. That fact not only appears from the of Miller and the admissions of his adversaries on nation, but from their conduct as well. Their joint require the property on the most favorable terms pos- sessed after it had become apparent that it could not at the price indicated.

It was located in the most desirable residential section but there were complications about the title which ant, while other property in the vicinity was being

In 1884 Mrs. Jane Lewis conveyed the land to a trustees, under the control and direction of the Vir- tice of the Methodist Episcopal Church. Subse- the Freedman's Aid and Southern Education Society thodist Episcopal Church, and the trustees of the Episcopal Church of Roanoke, Virginia, also became in the property. Thomas Lewis claimed and owned of reverter, which remained in the heirs of Jane vided the property should not be devoted to the pur- templated by the original deed; and it was necessary the titles of these various claimants before a mer- title could be acquired. The trustees had no au- sell the property without the consent and direction of rence. Accordingly, for the purpose of securing action in that behalf, it was arranged that Terry end the meeting of the Conference in March, 1905, hgh the medium of a friend, lay the matter before n March 18 a resolution was passed by that body, the trustees to sell the property at the best price ob-

On March 20 Terry returned to Roanoke, and on the day reported to his associates, Miller and Ferguson, Bishop, whom he represented as dominating the Con- declined to sanction a sale for less than \$20,000. To rry's exact language: "I told them (his associates) had lost out, and related what had occurred. Mr.

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Miller said he was sorry we had lost out, and Mr. Ferguson said he was glad we had not put any more money into the scheme." Terry and Ferguson concealed from Miller the passage of the resolution of March 18, while on that night, March 21, they met a committee of the trustees at Terry's residence and concluded an agreement with them for the purchase of the church's interest at \$8,000. The next meeting of the parties was held in Ferguson's office, June 19, 1904, when Ferguson sent for Miller and informed him they had ascertained that the "Miller Hill" lot would cost \$16,000—\$8,000 for the church's interest and a like sum for Colonel Lewis's; and that he was unwilling to advance so large an amount and divide profits with anyone. It was, thereupon, agreed that if Miller would refund the amount expended by Ferguson and Terry, which was estimated to be \$235, by 10:30 o'clock the next morning, they would abandon the enterprise in his favor; otherwise, Miller was to be considered "out of the deal." The defendants' version of what occurred is that, in addition to repaying the money expended, Miller also agreed to indemnify them against liability on the contracts of purchase. On the following morning, within the time limit prescribed, Miller repaired to Ferguson's office and tendered the amount agreed on, which Ferguson did not receive, but inquired, "Well, have you deposited the \$16,000 in the First National Bank?" Miller insists that he learned of this condition that morning for the first time, and his statement is corroborated by the circumstances. It is admitted that Ferguson and Terry called on Col. Lewis on the morning of the 20th, and obtained a verbal option to purchase his interest at \$8,000, so that indemnity against that agreement could not have entered into the compact of the previous day. Besides, subsequent events show that, if such terms had been imposed on Miller, he would have been willing and able to have complied with them. The parties chaffered over the new requirement until the time, 10:30 o'clock, had elapsed, when Ferguson closed the discussion with the declara-

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the time had expired and he could do nothing for him. Thereupon withdrew, and in less than an hour made attempts to deposit the \$16,000 and offered to do so, but was informed by Ferguson that he was too late.

The outline of the salient points in the testimony shows that the effect of the defendants can receive no countenance in a court of equity. The confidential relations arising out of the partnership called for the exercise of the utmost good faith and fair dealing between the parties, in lieu of which it appears that Ferguson and Terry, after availing themselves of Miller's plan and eliminating him as a possible competitor in negotiations behind his back, and withheld from him information of the gravest importance, vitally affecting his interests. Under such circumstances, it is idle to attempt to set up imaginary equities in behalf of the defendants on the theory that they were compelled to pay a higher price for the property than was originally contemplated. They were the masters of the situation, and whenever the price reached the point which, in their judgment, rendered the purchase inexpedient, it was only necessary for them to have withdrawn from the market. But it would be violative of the plainest principles of equity and fair dealing to permit them, after having voluntarily acquired the property, to exclude their associate from participation in the profits.

For these reasons, we are of opinion that the decree of the court is erroneous, and must be reversed.

*Reversed.*



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Syllabus.

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**Staunton.****ALBERT V. TIDEWATER RAILWAY COMPANY.**

September 12, 1907.

**1. CONTRACTS—Construction—Case at Bar—Railroads—Right of Way.—**

A railroad company bought a right of way through a tract of land at \$28 per acre; paid the purchase price and received a deed therefor. The deed provided that the company might change the center line of its right of way to either side a distance of not more than twenty feet, upon payment of an agreed price for the additional land taken. Subsequently the owner and the company entered into a contract by which the company was permitted to change its location upon payment of \$100 per acre for each acre taken, and the company agreed to reconvey to the owner the land theretofore conveyed to it, for which it was to receive a credit of \$200. The new location contained about eighteen and three-fourths acres, of which about eight and one-half acres was a part of the original location for which the company held a deed. The owner knew that the new location occupied a large part of the old, and went over it with the agent of the company before the contract was entered into. The owner claimed that he was entitled to receive \$100 per acre for the whole of the new location, less a credit for \$200. The company claimed that it was obliged to pay the \$100 per acre for only so much of the new location as was not covered by the old, and was to reconvey to the owner so much of the old location as was not covered by the new, and was to receive a credit therefor of \$200, and the court so held.

**2. EVIDENCE—Parol Evidence Rule—Surrounding Facts and Circumstances.—**Parol evidence will not be received to vary, alter, or contradict the terms of a valid written instrument, but where the language of a contract is ambiguous, or its construction doubtful, courts are not shut out from the same lights which the parties enjoyed when the contract was executed, and, in order to ascertain the intention of the parties, may hear evidence of the surrounding facts and circumstances so as to place themselves in the same situation which the parties who made the contract occupied, and thus judge of the meaning of the words and their application to the things described.

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from a decree of the Circuit Court of Montgomery Decree for defendant. Complainant appeals.

*Affirmed.*

inion states the case.

*Vysor*, for the appellant.

on, *Hall & Woods*, *A. A. Phlegar* and *Jno. R. John-*  
ne appellee.

ON, J., delivered the opinion of the court.

it was brought for the construction and specific per-  
of a contract for the sale of a strip of land, bought  
pellee railway company from the appellant as a right  
r its railroad.

ears that in March, 1905, appellee bought and paid  
it of way for its railroad through the lands of appel-  
received a deed therefor. This deed contains a pro-  
at the appellee shall have the right thereunder to shift  
the center line of the right of way to either side, a  
of not more than twenty feet at any point; and that,  
ch change is made in the location of the center line,  
ad company shall, if the additional land taken be on  
side of the right of way, pay therefor at the rate of  
er acre, and if on the south side, at the rate of \$100.00

This provision shows that, at the time the deed of  
905, was made, some change in the location of the  
way therein provided for was regarded by the parties  
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ontract we are now asked to construe and enforce was  
a contract, in writing, dated December 27, 1905, which  
that, in consideration of the appellee company adopting  
tion for its railway a line crossing the lands of the ap-

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pellant, he would convey to the company upon demand, a right of way 100 feet wide—that is to say, 50 feet wide on each side of the center line of the right of way, as finally located—together with such additional land as should be required for slopes, etc.; and as an additional consideration the appellee agreed to pay the appellant \$100.00 per acre for each acre, to reconvey the line theretofore conveyed to the company, and to receive a credit of \$200 therefor. Under this contract the appellee had thirty days in which to elect and give notice that it would take the land, and a reasonable time thereafter to make the necessary surveys and examination of the title for an apt and proper deed, which the appellant was to execute and deliver on demand. It further appears that the appellee company, immediately after the execution of this option contract, entered upon the strip of land in question, and began the construction of its railroad, and gave notice that it required a deed therefor. The strip of land thus taken and now occupied by the appellee contains 18.76 acres, of which 8.46 acres is part of the original right of way which was conveyed to the appellee.

The contention of the appellant is that, under the terms of the option contract of December, 1905, he is entitled to compensation at the rate of \$100.00 per acre for the whole of the 18.76 acres contained in the finally established right of way, or \$1,876, less the \$200 which the contract provides he shall pay for a reconveyance of the right of way originally adopted: that, according to the strict letter of the contract, he might have the right to require the appellee to establish its right of way over altogether new land and reconvey to him the whole of the old right of way, but that, inasmuch as the company has retained for its right of way a portion of the land for which it already has a deed, he is willing to permit appellee to remain in undisturbed possession of the right of way it has taken upon the terms that it pay to him \$100 per acre for the entire strip now covered by the right of way, notwithstanding the fact that appellee had bought and paid for, and already had a deed

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portion of such strip; the theory being that, when the company closed the option contract of December, 1905, the old line became, in equity, the property of appellant, when the new line was located, which included part of the original line, it was in its entirety a taking of appellant's property. It was agreed that \$100 per acre should be the result of this contention would be that the railroad would have to pay the appellant \$100 per acre for the land already bought from appellant and paid for, at the rate of \$28 per acre.

The construction of the contract is vigorously contested by appellee, it being insisted on its behalf that the correct interpretation of the contract and the understanding of the parties, shown by the surrounding facts and circumstances, was that the railroad company was liable to the appellant for the cost of new land taken by it, at the rate of \$100 per acre, \$30, less \$200, which the appellant must pay for the cost of the original strip not used by appellee, which it is willing to offer to reconvey to the appellant. In other words, in addition to the \$448 paid for the original strip, appellee must pay for the right of way last established, \$830 in money or conveyance to appellant of 8.46 acres of the land taken in this instance.

It appears from the record that, when the contract of December, 1905, was made, the line of the right of way conveyed by it had been finally located for nearly four months. It satisfactorily appears that this location was known to the appellant when the contract was made. He saw a copy of each line run; he saw that the stakes, put in the ground to mark out the line, crossed at various places and locations; and he had made a deed for the first location, and described it with minuteness. With the agent of the railroad who went to his house to get the contract of December, 1905, he went over a large part of the last line, and at his request, showed him the first line which had been

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somewhat obscured by the removal of stakes. Under these circumstances, it cannot be doubted that, when the contract of December, 1905, was executed, appellant knew that the new location occupied a large portion of the old.

It is, however, earnestly urged that the testimony taken by the appellee was for the purpose of varying a plain and unambiguous written contract, and that the objection thereto of the appellant should have been sustained.

It is undoubtedly true that parol evidence is not admissible to alter or vary the terms of a plain, unambiguous contract. But it is equally true that the light enjoyed by the parties when the contract was made, can be shed upon the transaction in aid of a proper construction, where the language of the contract is ambiguous and leaves its interpreter in doubt as to the meaning and purpose of the parties. *Lowrey v. Hawaii*, 206 U. S. 206, 51 L. Ed. 1026, 27 Sup. Ct. 622; *Talbot v. R. & D. R. Co.*, 31 Gratt. 685, 689.

In the case last cited, Judge Burks says: "To ascertain the intent of the parties is said to be the fundamental rule in the construction of agreements; (*Canal Co. v. Hill*, 15 Wall. 94. 21 L. Ed. 64), and in such construction courts look to the language employed, the subject matter and surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described." Citing *Nash v. Towne*, 5 Wall. 689, 699; 18 L. Ed. 527; *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713; *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121.

In the case of *Southern R. Co. v. Franklin &c. R. Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297, Judge Riely says: "It

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to observe that a court, in construing an agreement of purchase, leaves in doubt its meaning as to the particular land in controversy, in order to ascertain the intention of the parties, should have regard to the occasion which gave rise to the contract, the obvious design of the parties, and the result to be attained, as well as the language of the instrument. It should give the agreement that construction which will best effect the real intent and meaning of the parties as thus expressed in the entire instrument, and by reference to the circumstances attending the making of it."

In the case at bar, it does not appear on the face of the contract that the old and new locations touch at any point, and if they do not touch, there would be no ambiguity or dispute as to the land covered by the contract. But when it appears that the two lines are on the same land, an ambiguity arises at once, and the question must be answered, What land did the parties intend to purchase in the language used, should be paid for at the rate of \$100 per acre? When the court knows what the parties knew at the time the contract was made, the difficulty is easily solved. It is very plain, when seen, that the parties knew that the location of the new right of way covered about one-half of the old, and that the company would acquire about ten acres of new land and abandon about eight acres of the old at \$200 in gross, which was the consideration the appellant had received for it.

It is the opinion of the court that when the contract is read in the light of the facts disclosed by the pleadings and the evidence adduced, it is very clear that the parties never contemplated that the railroad company was to be required to pay appellant \$100 per acre for such of its own land as it might see fit to retain in locating the new right of way agreed upon; the only proper construction of the contract of December, 1907, is that the company should pay appellant \$100 per acre for the new land acquired by it and embraced in the new location, and should reconvey to appellant that portion

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of the old line not used as part of the new right of way, for which reconveyance the railroad company was to have a credit of \$200.

The circuit court having reached this conclusion, its decree must be affirmed.

*Affirmed.*

Statement.

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**Staunton.**

**BARNES v. TIDEWATER RAILWAY CO.**

September 12, 1907.

1. **EMINENT DOMAIN**—*Report of Commissioners—Weight—Amount of Damages.*—Where commissioners in condemnation proceedings have heard the evidence of the witnesses offered, and have also viewed the premises, their findings as to amount of the damages which land owners will sustain, are entitled to great weight, and will not be disturbed by the courts except upon clear evidence that their estimates were excessive or inadequate. For error of judgment in arriving at the amount of damages, if any, there can be no correction, especially where the evidence is conflicting, unless the damages allowed are so excessive or inadequate as to show prejudice or corruption. The commissioners are not bound by the opinions of experts or the apparent weight of the evidence, but may form their own conclusions.

Error to a judgment of the Corporation Court of the city of Roanoke, in a proceeding to condemn land for railroad purposes. Defendant assigns error to the judgment of the court confirming the report of the commissioners and refusing to allow damages for alleged injury to his property on the opposite side of the street from that taken.

*Affirmed.*

The opinion states the case.

*Robertson & Wingfield*, for the plaintiff in error.

*Robertson, Hall & Woods*, for the defendant in error.



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Opinion.

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HARRISON, J., delivered the opinion of the court.

This proceeding was instituted by the Tidewater Railway Company for the purpose of condemning and acquiring title to a portion of certain land owned by H. C. Barnes, the plaintiff in error.

It appears that the plaintiff in error owned two parcels of land, one located on the south side of Ferdinand avenue, in the city of Roanoke, through which the railroad passes, and the other on the north side of the same avenue, no part of which is taken for railroad purposes. Commissioners were appointed by the court to ascertain a just compensation for the land taken, and to award the damages to the adjacent or other property of the defendant, Barnes, or to the property of any other person, beyond the peculiar benefits that would accrue to such properties, respectively, from the construction and operation of the works of the railroad company.

The commissioners found the aggregate of land taken to be 3.31 acres, more or less, and assessed the compensation therefor at \$1,250. They further ascertained that the damages to the adjacent and other property of the plaintiff in error, by reason of the construction and operation of the works of the company, beyond the peculiar benefits that would accrue to such properties, respectively, was \$2,650; making an aggregate finding for land and damages in favor of H. C. Barnes of \$3,900. They further found and reported that no damage was done to the property of any person other than the plaintiff in error.

This report was excepted to by the plaintiff in error, upon the ground that the compensation and damages awarded were inadequate, and because no damage was allowed for the property on the north side of Ferdinand avenue. The commissioners made no separate finding as to the property on the north side of Ferdinand avenue, but the testimony taken in the case shows that, upon due consideration thereof, they reached the conclusion that the land on the north side of the avenue would

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aged by the construction and operation of the rail-  
as agreed at the hearing that the \$3,900 awarded by  
sioners should be accepted in full satisfaction of all  
on and damage to which the plaintiff in error was  
cept that which it was contended would be sustained  
on the north side of the avenue from the construc-  
operation of the railroad, as to which the commission-  
ed no damage accrued.

hearing of the exception, which was under the agreed-  
ed in the manner already indicated, both parties in-  
vidence on the question as to whether or not the  
n the north side of Ferdinand avenue would be de-  
n value by the construction and operation of the  
After hearing the evidence, the court entered the  
complained of, overruling the exception of the plain-  
or, and confirming the report of the commissioners.

error assigned by the petitioner is, that the report  
mmissioners should have been set aside, because it  
damages for the land on the north side of Ferdinand  
part of which was taken. In support of this as-

the plaintiff in error discusses the act concerning the  
the power of eminent domain, the damages thereby  
ed for injury done to land lying adjacent to that  
the construction and operation of a railroad, and  
considers the elements of injury that should be  
n such a case; it being insisted that the evidence  
commissioners and before the court shows that the  
e north side of the avenue will be injuriously affected  
ration and construction of the proposed railroad.

osing of this case, it is unnecessary for us to follow  
eration and discussion given by counsel for plaintiff  
o the "Eminent Domain Act," for, if his view as to  
construction of the statute be sound (as to which  
s no opinion), it could not affect the result in this  
e being nothing in the record to show that there has

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been any failure, on the part of the court of the commissioners to consider all the elements of injury which, it is insisted, should be considered. The court was not asked to instruct the commissioners as to the elements of injury they should consider, nor does any issue touching that matter appear of record to have been presented in any other form. The order appointing the commissioners follows, substantially, the language of the statute, and explicitly directs that they go upon the premises and view the land or other property, or such interest or estate therein, wanted by the railroad for its purposes; and, after viewing the same and hearing such proper evidence as either party may offer, ascertain a just compensation therefor, *and award the damages, if any, resulting to the adjacent or other property of the defendant*, or the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the works of said company. The report of the commissioners also follows the language of the statute, and shows that, after ascertaining a just compensation for the land taken, they estimated the damages *resulting to the adjacent and other property of the owner*, by reason of the construction and operation of the railroad, beyond the peculiar benefits, etc.; and the evidence shows that the commissioners duly considered the land north of Ferdinand avenue, viewed the premises, and, after hearing the testimony of witnesses introduced by the parties, reached the conclusion that the land north of Ferdinand avenue was not injured by the construction and operation of the railroad.

The sole question presented for our determination is, whether or not the lower court erred in overruling the exception taken to the conclusion and finding of the commissioners, and in confirming their report.

The doctrine is well established that the findings of a commission in a case like this are entitled to great weight, and are not to be disturbed by the courts, except in instances where excessive or inadequate estimates, on their part, are shown by

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evidence. For error of judgment of the commissioners in arriving at the amount of damages, if any, there can be no objection, especially where the evidence is conflicting, and damages allowed are so excessive or inadequate as to indicate prejudice or corruption.

by Judge Keith, in *Railroad Co. v. Chamblin*, 100 Va. 66, 41 S. E. 750, 752, "The best that can be done is to require capable and upright commissioners to go upon the premises, inquire into the facts, hear testimony, and consider all the facts and circumstances surrounding the situation, and likely to enter into the value of the subject, and thus ascertain what is the value of the land to be taken, and the effect of such taking upon the value of the tract." *Cranford Paving Co. v. Baum*, 97 Va. 24, 34 S. E. 906; *R. & P. R. Co. v. Seaboard, &c., Co.*, 99 Va. 49, 49 S. E. 512; *Tidewater Ry. Co. v. Cowan*, 106 Va. 66, 86 S. E. 819; *Shoemaker v. United States*, 147 U. S. 282, 13 Ed. 170, 13 Sup. Ct. 361.

In the case last cited, the court, at, p. 306, of 147 U. S., says: "The law on this subject is so well settled that we shall content ourselves with repeating an apt quotation from Mills on Eminent Domain, 246, made in the opinion of the court below: 'The appellate court will not interfere with the report of commissioners unless it is shown to correct the amount of damages, except in cases of fraud or showing prejudice or corruption. The commissioners are to examine the evidence and frequently make their principal report out of a view of the premises, and this evidence cannot be set aside so as to correct the report as being against the weight of the evidence. Hence, for an error in the judgment of the commissioners in arriving at the amount of damages, there can be no objection, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the weight of evidence, but may give their own conclusions.'"

In the case at bar, there is no suggestion of prejudice or error on the part of the commissioners. It appears that,

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after viewing the premises and hearing the testimony of the witnesses introduced by the parties, the commissioners reached the conclusion that the adjacent or other land of plaintiff in error, lying on the north side of Ferdinand avenue, would suffer no injury from the construction and operation of the railroad, and therefore no damage was reported on that account. It further appears that, upon the hearing of the exception taken to the report of the commissioners, the evidence was very conflicting, the plaintiff in error introducing eight witnesses, who testified that the commission committed error in arriving at the conclusion that the property in question would not be damaged, and the defendant in error six witnesses, who sustain the judgment of the commissioners by testifying that, in their opinion, the property would not be damaged. After hearing this evidence, the learned judge of the lower court, who had the opportunity of seeing the witnesses and of observing their manner of testifying, was of opinion that the exception to the commissioners' report should be overruled.

Upon well settled principles, the lower court could not, under the circumstances of this case, have done otherwise than overrule the exception to the report, and its judgment must be affirmed.

*Affirmed.*

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## Staunton.

## BATTERSHALL AND OTHERS v. ROBERTS.

September 12, 1907.

1. **BILLS OF EXCEPTION**—*When to be Filed—Consent of Record.*—Under the provisions of section 3385 of the Code of 1904, the consent of counsel that bills of exception may be signed after the lapse of thirty days from the adjournment of the term at which an opinion of the court is announced to which exception is taken, must be entered of record as a part of the final order of the court in the cause, else the exception is not well taken, and the bill is no part of the record. The court cannot, on the mere motion of the exceptor, and without such consent entered of record, postpone from term to term the signing of such bills. A memorandum signed by counsel on both sides, and annexed to bills of exception filed several terms thereafter, to the effect that such bills of exception "have been examined and agreed to," is not sufficient. The signing of bills of exception so as to make them a part of the record is a judicial act of purely statutory origin, and the provisions of the statute must be strictly observed.

Error to a judgment of the Circuit Court of Carroll county in an action of ejectment. Judgment for the plaintiff. Defendants assign error.

*Affirmed.*

The opinion states the case.

*Bolen & Tipton*, for the plaintiffs in error.

*N. P. Oglesby* and *M. M. Caldwell*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

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This is an action of ejectment brought in the Circuit Court of Carroll county, in which the jury returned the following verdict: "We, the jury, find for the plaintiff in fee simple the land in the declaration mentioned;" and the final order in the case, entered at the term at which the verdict was returned, is as follows:

"Whereupon the defendants moved the court to set aside the verdict of the jury and grant them a new trial, which motion the court overruled. The defendants then moved the court in arrest of judgment, which latter motion the court likewise overruled. Therefore it is considered by the court that the plaintiff recover against the defendant the land in the declaration mentioned in fee simple, as therein claimed and specified, and her costs by her about her suit in this behalf expended. To which ruling of the court, in refusing to set aside the said verdict and to arrest the judgment, the defendants excepted, and they are allowed to the next term to file their bill of exceptions and spread the facts."

On the 9th day of May, 1905, at a subsequent term of the court, this order was entered: "On motion of the defendants, they are allowed until the next term of this court to file their bills of exceptions and spread the facts in the case." A similar order was made at a still subsequent term, September 14, 1905, and again on the 12th day of December, 1905; and finally, at a term of the court held on the 10th day of March, 1906, an order was entered in the cause as follows: "The defendants this day presented their four bills of exceptions, in which are contained the facts proven on the trial of the case, which bills are signed, sealed and made a part of the record." Then follow the four bills of exception referred to, to which a memorandum, signed by counsel for plaintiff and defendants, is annexed, in the following words: "The foregoing four bills of exceptions have been examined and agreed to."

The first question presented for our consideration is, are the

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bills of exception copied into the record properly authenticated?

If the memorandum annexed to the four bills of exception could be construed as an agreement between counsel that the bills of exception might be then signed and made a part of the record, the question still remains, whether or not they could, by such an agreement, be engrafted upon the record for consideration by this court?

In the case of *Virginia Development Co. v. Rich Patch Iron Co.*, 98 Va. 700, 37 S. E. 280, the final order entered in the circuit court contained the following language: "By agreement of counsel, and for reasons appearing to the court, leave is hereby given the plaintiff to file bills of exception within sixty days from the rising of the court, such bills to have the same effect as if signed, sealed, enrolled, and filed during the present term;" and this court held that there was no authority under the statute for the circuit court to sign bills of exception after the term at which the final judgment was entered, and that bills of exception so signed and copied into the record were not properly authenticated and could not be considered.

Following the decision in that case, the statute in force since the adoption of the Code of 1849 (which provided that bills of exception could be signed during the term at which the final judgment was entered) (*Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606), was amended by an act approved February 15, 1901 (Acts 1901, p. 186), so that any bill of exception might be tendered to the judge and signed by him, either during the term at which the opinion of the court was announced to which exception was taken, or in vacation within thirty days after such term, or at such other time as the parties by consent entered of record might agree upon; and that any bill of exception so tendered shall be part of the record of the case. Va. Code, 1904, sec. 3385.

It is clear, upon reading the statute as thus amended, that in order to clothe the judge of the trial court with authority



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after the court is adjourned for the term, to authenticate and make part of the record bills of exception to rulings of the court noted during the trial, as was attempted in this instance, the consent of the parties that this may be done must be entered of record as a part of the final order of the court in the cause.

As was said in *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908, the object of the act was to extend the time within which bills of exception might be taken; but in order to perfect bills of exception duly taken to rulings during the trial, they must be presented in vacation within thirty days after final judgment, or within such time as the parties shall agree, of record.

In *Hoover v. Saunders*, 104 Va. 783, 52 S. E. 657, it was held that, in the absence of any agreement between the parties, bills of exception can only be signed during the term at which the opinion of the court is announced, to which exception is taken, or in the immediately succeeding vacation, within thirty days after the end of that term. They cannot be signed during a succeeding term, nor during any other vacation than that immediately succeeding the term at which the opinion was announced. The beginning of a new term, although within thirty days, puts an end to the court's jurisdiction to sign such bill.

It appears in this case, not only that a final judgment was entered at the March term, 1905, of the circuit court, but that the court, by its order entered at its subsequent May term, 1905—not by consent of the parties entered of record, as the statute requires, but on the motion of the defendants—allowed the defendants until the next term of the court to file their bills of exception, etc., and by similar orders, the matter of authenticating and filing the bills of exception was kept open until the March term of the court, 1906, which was wholly without any authority conferred by the statute.

In *Va. Devel. Co. v. Rich Patch I. Co.*, *supra*, it is shown that the power to authenticate bills of exception and make

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them a part of the record in the trial of a case at law, in which a writ of error or supersedeas lies to a higher court, is of statutory origin, and that, by the terms of our statute then in force; it could not be exercised after the end of the term at which the final judgment was rendered; that, in order to give the court, at a subsequent term, authority to add to the record by signing a bill of exception, some control must be reserved by the court over the case, as by failure to enter a judgment, by entering a motion for a new trial and continuing it until the next term, or by leave reserved to sign a bill of exception on or before a particular day of the next term, and the presentation of the bill of exception for signature in accordance with the terms of the leave reserved; in other words, the statute conferring authority upon the trial court to add to the record by signing a bill of exception must be strictly observed, the signing of bills of exception so as to make them part of the record being a judicial act, and such a judicial act as the court itself was powerless at common law to perform, even during the term at which the judgment was rendered, or at any time.

In the case at bar, the statute has not been observed. Therefore, though with regret, we have to reach the conclusion that the bills of exception copied into the record are not properly authenticated, and cannot be considered.

It is, perhaps, well to call attention to the fact that more miscarriages, in the effort to bring the rulings of trial courts under review in this court, have occurred in the six years since the amended statute, *supra*, has been in force, than in all the years prior to its passage. And why? Simply because the statute has not, in the cases where the miscarriages have occurred, been strictly followed, as is absolutely necessary, in order to confer authority upon the judges of trial courts, to sign a bill of exception, and make it a part of the record, after the adjournment of the term at which the final judgment in the cause is entered.

The bills of exception copied into this record not being prop-

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erly authenticated, for that reason cannot be considered, and therefore, no error appearing in the judgment of the circuit court, it has to be affirmed.

*Affirmed.*

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[Staunton.

CHILDRESS v. JORDAN, TRUSTEE.

September 12, 1907.

Absent, Buchanan, J.

I. PRINCIPAL AND SURETY—*Insolvency of Principal—Set-Off by Surety.*—

The surety of an insolvent principal, who subsequently becomes indebted to such principal, may, in equity, set off his liability as surety against his indebtedness as against a third person whose rights have subsequently accrued. Courts of equity always recognize the influence of insolvency on the rights of parties touching the matter of set-offs, and, in adjusting transactions between them, will regard the equities of the solvent party, and so accommodate their affairs as to minimize, as far as consistent with the rights of third persons, loss from that cause.

Error to a judgment of the Circuit Court of Montgomery county in an action of detinue. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Archer A. Phlegar*, for the plaintiff in error.

*Longley & Jordan*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The narrow question presented by this record for decision involves the correctness of the ruling of the circuit court in sus-

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taining the application by Cowan of a certain payment in discharge of what we shall term the Carper debt. The essential facts are as follows:

Wilson and Cowan were partners as liverymen, and the former purchased the latter's interest in the business for \$500 giving his note therefor with a deed of trust on the property as security, and also assuming payment (among other partnership liabilities) of the Carper debt, which amounted to \$315. In February, 1906, Cowan purchased of Wilson horses and mules included in the deed of trust, at the aggregate price of \$870, a sum sufficient to have satisfied the secured debt if all of it had been applied to its payment. Wilson, who was admittedly insolvent, failed to pay the Carper debt, and the firm note was protested and subsequently paid by Cowan, June 22, 1906. In April, 1906, the plaintiff in error, Childress, bought from Wilson the trust property described in the declaration, and having refused to pay the defendant in error, Jordan, trustee, the purchase money, the latter brought suit to recover the property, or its alternate value.

Though the action was in detinue, the parties waived a jury and submitted their rights to the court to be determined, as if the proceeding had been a suit in equity. Thereupon the court sanctioned the dedication by Cowan of a sufficient amount of the money due on his indebtedness to Wilson to discharge the Carper debt, leaving a balance due from Wilson to Cowan of \$403.59. The court also fixed the value of the property bought by Childress at \$350, and rendered judgment in behalf of the plaintiff against him for that sum, to which judgment Childress brings error.

We are of opinion that, upon the foregoing facts, Cowan was entitled, in equity, to protection against the Carper debt out of his indebtedness to Wilson. Courts of equity always recognize the influence of insolvency on the rights of parties touching the matter of set-offs, and in adjusting transactions between them will regard the equities of the solvent party and

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accommodate their affairs as to minimize, as far as consistent with the rights of third persons, loss from that cause.

The principle is illustrated by text-writers and numerous judged cases. The decisions of this court on the subject will be found in notes to the case of *Feazle v. Dillard*, 5 Leigh (Va. Ann.) 21. In the principal case, Feazle was permitted, in equity, to set off the amount of a bond on which he was surety for Dillard, who was insolvent, against his own bond to Dillard in the hands of an assignee, though not due, he having become surety before notice of the assignment.

So, in this case, Cowan's liability to pay the Carper debt having attached before the right of Childress accrued, his superior equity must prevail.

We are of opinion that the judgment of the circuit court should be affirmed.

*Affirmed.*

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Statement.

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**Staunton.**

CLEAR CREEK WATER Co., INCORPORATED v. GLADEVILLE  
IMPROVEMENT Co.

September 12, 1907.

1. EMINENT DOMAIN—*Water Apart from Land—Virginia Statutes—Interest and Estate in Land.*—Under the present statute law of this State (Code, 1904, Ch. 46 B), a public service corporation having authority to condemn “lands, water, water rights, or any other property, and any estate or interest therein for its uses and purposes,” may, as against a lower riparian owner, condemn the entire estate of such owner in the water of a stream without condemning the bed of the stream over which the water flows. If such owner owns the fee-simple estate in the land, his riparian rights in the water flowing through it are appurtenant and co-extensive with that estate, and no less estate in the water can be condemned. The water flowing through the land is an *interest* in the land, and nothing less than the owner's whole *estate* in this interest can be condemned, but it is not necessary to condemn his whole interest in the land in order to acquire the water.
2. EMINENT DOMAIN—*Water Apart from Land—Compensation.*—Interests in water, as well as in land, are subject to the law of eminent domain. Such interests are indispensable to water companies, and, when the waters of a stream are diverted, the inferior riparian proprietor is entitled to compensation for the use of the water of which he is deprived.

Error to a judgment of the Circuit Court of Wise county, in a condemnation proceeding. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

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*Bullit & Kelly and John W. Chawkey*, for the plaintiff in error.

*Vicars & Peery*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, the Clear Creek Water Company, Incorporated, a public service corporation, having authority to condemn lands, water, water rights, or any other property, and any estate or interest therein for its uses and purposes, filed its petition in the Circuit Court of Wise county against the defendant in error, the Gladeville Improvement Company, an inferior riparian proprietor, under Ch. 46 B, Va. Code, 1904, for the purpose of condemning certain riparian rights of the defendant in error in Clear Creek, by intercepting and diverting all the waters in said creek and the two main forks thereof (or as much as would flow through a 12-inch pipe) into and through the plaintiff in error's pipe line at the point of its proposed intake, dams and reservoir, above the lands of the defendant in error, to supply the inhabitants of the town of Norton with water for domestic purposes.

There was a demurrer to the petition, and the Circuit Court "being of opinion that the law does not authorize a water company to condemn a water right only, but that it must, if it condemns at all, condemn the whole interest owned by the defendant, that is, the land itself," sustained the demurrer, and dismissed the petition.

That this ruling is a correct exposition of the law as it was under the Codes of 1873 (Ch. 56, s. 11) and 1887 (Ch. 46, s. 1079) is admitted. Indeed, the provisions referred to (which are identical), were so construed by this court in the cases of *City of Roanoke v. Berkowitz*, 80 Va. 616, and *City of Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520. In the latter case the court observes: "It may be true, as counsel for the



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city earnestly contend, that it is a great hardship upon the city to be compelled to condemn and pay for property which it does not need, in order to get what is necessary for its purposes. This is an argument more properly addressed to the Legislature than the courts."

It is suggested that these decisions accentuated the necessity for a more liberal policy, and induced the Legislature to revise the law and adopt the rule which at present obtains. However that may be, the statutes now in force manifest a legislative purpose to confer upon public service corporations the power to condemn interests in land other than the entire interest, when a partial, and not the entire, interest is needed for the purposes of the corporation.

Thus, the Va. Code, 1904, sec. 1105c., clause 2 (f) authorizes such corporations, "in the manner and subject to the limitations provided by the general statutes . . . for the condemnation of land," to condemn for their purposes, "sand, earth, gravel, water, or other material;" and sections 1105f (4) and 1105f (5) prescribe the procedure for condemning any "land or other property, or any interest or estate therein." This phraseology characterizes the various provisions of Ch. 46 B. and differentiates them from the statutes construed in the cases cited.

Section 1079 of the Code of 1887 declares, that upon the payment to the parties entitled thereto, or into court, of the sum ascertained by the commissioners as a just compensation for the land taken, and for damages to the residue of the tract. "the title to that part of the land for which compensation is allowed shall be absolutely vested in the company . . . in fee simple, except in the case of a turnpike company, when a sufficient right of way only for the purposes of said company shall be vested;" while the corresponding provision of the present statute (section 1105f (9), as amended, Acts 1905-6, p. 452). is as follows: "Upon such payment, either to the person entitled thereto or into court, and confirmation of the report, the title

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to the part of the land, and to the other property for which compensation is allowed, shall be absolutely vested in the company, in fee simple, except in the case of a turnpike company, when a sufficient right of way only for the purpose of such company shall be used, and except also the case of any other company, when, if the notice of the application to the court shall so specify or describe, and the petition shall so pray, the interest or estate as shall be so specified and prayed for shall be vested. *Nothing in this Act contained shall be construed as authorizing the condemnation of a less estate in the property taken than is owned by the party against whom this proceeding is.*" The italicized words constitute the limitation imposed by the amendment in the Act of 1905-6.

Among other definitions, Bouvier observes that "estate" "signifies the quantity of interest which a person has, from absolute ownership down to naked possession." It is in this sense that the term is employed in the amended Act of 1905-6. It denotes the quantity of interest of the owner in the subject sought to be condemned. Prior thereto it might have been competent to carve an inferior estate (*e. g.* an estate for life or years) out of the fee simple, and to have condemned the lesser estate, leaving the reversion in the owner. The purpose of the amendment was to abolish a provision so obviously unjust to the owner, and to require the condemnation of the entire estate in the property proposed to be taken.

It will be noticed that the word "interest" does not occur in the amendment. So far as the *interest* which may be condemned is concerned, the statute is left intact, the amendment deals only with the *estate*. Authority to condemn interests in "any land, sand, earth, gravel, water, and other material," is left unimpaired, but the entire estate in such parts of these various subjects as is proposed to be taken, whatever that estate may be, must be condemned.

In this instance, the plaintiff in error's water-mains are to connect with a reservoir above, and will not invade the land

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of the inferior riparian owner. The company needs to intercept and divert the water of the stream for its purposes, but has no occasion to use the bed of the creek, and may not, therefore, be required to condemn the land over which the water flows. But the defendant in error owns an estate in fee simple in the lower premises, and its riparian rights in the water are appurtenant to and co-extensive with that estate. The condemning company must, therefore, participate in the water of the stream on that basis, and expropriate the perpetual easement of the defendant in error therein.

Interests in water, as well as in land, are subject to the law of eminent domain. *Hamor v. Bar Harbor Water Co.*, 78 Me. 127, 3 Atl. 40. Such interests are indispensable to water companies, and when the waters of a stream are diverted, the inferior riparian proprietor is entitled to compensation for the use of the water of which he is deprived. This principle is illustrated by numerous decisions. The following have more or less pertinency to the case in judgment: *Cooper v. Williams*, 5 Ohio 391, 24 Am. Dec. 299; *Gilzinger v. Saugerties Water Co.*, 66 Hun 173, 21 N. Y. Supp. 121; *Smith v. City of Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Heilman v. Union Canal Co.*, 50 Pa. St. 268; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Trenton Water-Power Co. v. Raff*, 36 N. J. Law 335; *Avery v. Fox*, Fed. Cas. No. 674, 1 Abb. (U. S.) 246.

The remaining ground of demurrer, based on the alleged insufficiency of the plat, which the statute requires shall accompany the petition, is not sustained by the record, and was properly overruled.

Upon the whole case, we are of opinion that the law on the demurrer to the petition is with the plaintiff in error, and it must, consequently, be overruled and the case remanded for further proceedings.

*Reversed.*

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Syllabus.

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**Staunton.****DAVIS AND OTHERS v. OWEN.**

September 12, 1907.

**I. ADVERSE POSSESSION—*Hostile Claim—Possession Taken by Mistake.*—**

In this case, land was conveyed to school trustees in 1873 for school purposes, and they erected a school house thereon, and a few years thereafter the alienee of the grantor of the residue of the tract enclosed it, and, by mistake, cut off with the school-house lot more land than was conveyed to the trustees; and the trustees, holding the legal title to the land and the right to the possession thereof, gave permission to a religious congregation to worship there and also to erect a church and bury their dead on the school-house lot. The congregation, intending to confine themselves to the school-house lot, erected a church on the lot, but, in doing so, encroached upon the land cut off as aforesaid by mistake, and also buried some of their dead thereon, about eight years before the institution of this suit. All that was done upon the lot by the congregation was after permission first obtained from the school trustees. The alienee of the grantor of the residue of the original tract had his land surveyed shortly before the institution of this suit, and discovered the above mentioned mistake, and notified the congregation that he claimed all the land not included in the grant to the school trustees. This suit was then brought by the trustees of the congregation to quiet their title to the whole lot cut off, claiming title by adverse possession, and to enjoin said alienee from disturbing their possession. The school trustees were made parties defendants, and they disclaimed all title to any of the land except that originally conveyed to them. The Circuit Court dismissed the bill of the complainants.

**Held:** The complainants' right of possession is subordinate to and dependent upon the right of possession of the school trustees, who disclaim title to the land in controversy, and they have not title by adverse possession. First, because not of sufficient duration, and second, because possession taken by mistake, and not under a claim of right, cannot ripen into adverse possession, and hence their bill was rightly dismissed.

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2. **ESTOPPEL**—*Ignorance of Facts—Possession Taken by Mistake.*—The owner of land encroached on by a church building and cemetery, upon ascertaining, for the first time, that there has been such encroachment, is not estopped from asserting his title thereto, when, at the time of the encroachment, both he and the parties encroaching thought that the building and cemetery were on the land of an adjacent owner who had consented thereto.

Appeal from a decree of the Circuit Court of Bedford county. Decree for defendants. Complainants appeal.

*Affirmed.*

The opinion states the case.

*N. T. Goldberry*, for the appellants.

*Miller & Lowry*, for the defendants.

CARDWELL, J., delivered the opinion of the court.

The facts out of which this appeal arises are as follows: In the year 1873, Thomas T. Munford was seized and possessed of a boundary of real estate in the county of Bedford, Virginia, near Forest, containing several hundred acres, and on the 3rd day of June of that year, Munford and wife executed a deed conveying to Edward S. Hutter and two others, as school trustees of Forest District, a portion of said tract of land, for the purpose of building a public free school for the benefit of the colored people of that district. The deed conveyed to the trustees named a specified piece of ground, definitely described by metes and bounds, beginning at a definite point, and running thence in certain directions, and as containing 3 rods, 35 poles.

After that deed was made and recorded, Munford and wife conveyed to one Murrell all the residue of the tract of land from which the "school-house lot" had been cut off. Sub-

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sequently C. H. Owen became the successor in title to the land conveyed to Murrell, containing 224 a., 3 r., 12 p., by virtue of a deed dated August 2, 1898, from a commissioner of the Circuit Court of Bedford county in a chancery cause therein pending. This 224 a., 3 r., 12 p., thus conveyed to Owen, is described as lying contiguous to and adjoining the school house lot, which had theretofore been conveyed to the school trustees of Forest District.

The deed to the trustees for the school-house lot, after setting out that the conveyance was for the purpose of building on the lot a public free school-house for the benefit of the colored children of the district, under the supervision and control of the school trustees, contains this clause: "Provided, however, and the condition of the foregoing deed is, that if said granted premises are occupied for any purpose excepting for a school or church for the improvement and free education of the colored people of said school district, then this deed shall become void, and said premises revert to said parties of the first part, their heirs and assigns."

The school trustees took possession of the lot of land conveyed to them, and built thereon a house, to be used for a school for colored children in Forest District. Before the school-house was built, however, the colored people in the community approached the school board and offered to contribute to the erection and maintenance of the house, provided the school board would permit the colored people to hold religious services therein, which was agreed to, and the organization, under the name of Altha Grove Baptist Church, apparently controlled the religious services conducted thereafter on these premises.

It further appears that, after the erection of the school-house, a rail fence was built on the residue of the Munford farm, which cut off from the remainder of the farm not only this school-house property of 3 r., 35 p., but in addition thereto and adjoining the school-house lot and between it and the rail fence, a piece of land containing 1 1-14 acres. At the time Owen ac-

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quired title to the Munford farm, he employed a surveyor to survey its boundaries and locate the line between it and the school-house lot, and when making the survey, instead of running around the school-house lot according to the metes and bounds in the Munford deed, the surveyor "faced" the school-house lot and deducted the acreage of the lot (3 r., 35 p.) from the land he surveyed for Owen. Subsequently, a controversy having arisen between Owen and the trustees of Altha Grove Baptist Church (not the trustees of Forest School District) as to the boundary line between the school property and that of Owen, the latter employed a surveyor to ascertain exactly the location of the line. This survey was made in May, 1904, and shortly thereafter Alex. Davis and others, appellants here, styling themselves "Trustees of Altha Grove Baptist Church and colored school of Bedford County," filed their original bill, enjoining Owen from interfering with or trespassing upon the school-house property or the parcel of land lying between it and the rail fence—in other words, to quiet the title claimed by appellants to the land lying outside the rail fence and including the school-house lot—alleging that Owen was threatening to cut and remove all the standing timber upon this land, claimed by appellants by virtue of the deed from Munford and wife to the trustees of Forest School District, and by adverse possession. Thereafter, they filed an amended bill, and still later an amended and supplemental bill, to which they made not only Owen, but F. W. Nelson and two others, the then school trustees of Forest District, under the general free school system of the State of Virginia, parties defendant, and repeating the charges of the original bill, that Owen was trespassing or threatening to trespass, on the disputed property, whereby it would be irreparably injured, etc.

To each of these bills Owen filed his demurrer and answer, and Nelson and others, school trustees of Forest School District, also demurred and answered. In his answer Owen disclaims any right, title or interest in the school-house lot, and denies

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having trespassed thereon or interfered with its peaceful and quiet enjoyment for the purposes for which the lot was originally conveyed to the school trustees of Forest School District, but does claim the 1 1-14 acres of land between the school-house lot and the rail fence. Nelson and others, in their answer, while claiming title to the school-house lot, the school-house thereon and the possession thereof, by virtue of the deed from Munford and wife to their predecessors in office, particularly disclaim any right to the parcel of land lying between the school-house lot and the rail fence, or to the possession thereof, and deny that Owen has in any way trespassed upon or injured the school-house lot, or has ever threatened to do so, as charged in appellants' bills. They further deny that the school-house lot was conveyed for any purpose other than for erecting a school-house thereon for educating the colored children, and deny the right of appellants to any control whatsoever over the property.

The demurrers to the several bills having been overruled, the cause was heard upon the bills, the answers thereto, and the evidence taken on behalf of both parties; whereupon, the Circuit Court dissolved the injunction theretofore awarded in the cause, and dismissed the bills, and from that decree the case is brought here on appeal.

It is needless to review the numerous assignments of error in the petition for the appeal and elaborately argued, as appellants utterly fail to show that they are entitled to the relief they ask.

They claim, not only the school-house lot of 3 r., 35 p., but the parcel of land lying between that lot and the rail fence, containing 1 1-14 acres. They claim title to the school-house lot by virtue of the deed from Munford and wife to the school trustees of Forest School District; that the paramount object of the conveyance was for religious purposes; and that they have had possession of the whole property—not only the part conveyed, but the 1 1-14 acres between it and the rail fence—for



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a period of over thirty years, which possession has been exclusive, open, notorious and hostile, and under color of title.

In the first place, the appellants' right, if any, to this school-house property, or the possession thereof, is, and has all along been, dependent upon and subordinate to the rights of the school trustees. The legal title to the property is in the school trustees. The right to the possession of the property is in them. and this was recognized by all parties in interest, as shown conclusively by the admitted fact that when the colored people desired to hold religious services upon the property, they sought and obtained permission of the school trustees for that purpose. When they desired to erect a church on the property, they sought and obtained permission from the school trustees, and appellants have not shown a shadow of legal title to the 1 1-14 acres of land between the school-house property and the rail fence, or any sort of possession thereof which could have ripened into title by adversary possession.

From the pleadings and the proof in the cause, it clearly appears that it was only some eight or nine years prior to the institution of this litigation when permission was granted to the Altha Grove Baptist congregation to erect a church on the lot conveyed to the school trustees, and to remove the school-house to another point on the property. This they did, but erected the church partly on the land claimed by Owen in this suit, which was not conveyed to the school trustees by Munford and wife. About the same time, the members of Altha Grove Baptist Church commenced to bury their dead on what was supposed to be the school-house lot, and this grave-yard likewise encroaches upon the land claimed by Owen.

It further appears that when a survey of the school-house lot was made in May, 1904, in running the dividing line between it and the land of Owen, it was found that a part of the church building and a part of the grave-yard were located on Owen's land; whereupon, he directed the surveyor to "drop back" and run the line in such a way as to put the whole of the

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building on the school-house lot, and offered, in his answer filed to the original bill in this cause, to release all claim he had to that part of the grave-yard which is on his land; but these offers of settlement of the controversy were declined by appellants, and they assert, as stated, a claim to the whole of the land lying outside of the rail fence and including, not only the school-house lot, but the 1 1-14 acres, notwithstanding the fact that the school trustees of Forest School District do not claim title to or right of possession in any land except the 3r., 35 p., conveyed to their predecessors in office by Munford and wife, but on the contrary disclaim any right to more of the land than was so conveyed.

The claim of appellants that they have had exclusive, notorious and hostile possession for a period of time sufficient to bar appellee from setting up a claim to any of the land outside of the rail fence, is absolutely discredited by the admissions made in the pleadings and proof in the cause. The boundaries of the school-house lot were not marked on the land further than was shown by a public road; and the fact that the colored people have for some time encroached upon the land of appellee could not ripen into a title by adverse possession. First: Because their right of possession is subordinate to and dependent upon the right of possession of the school trustees; the school trustees claiming nothing except what was conveyed to them by the deed of Munford and wife, the colored people could never obtain any greater right; Second: Because neither the building of the church, which was built partly upon appellee Owen's, property, nor the encroachment of the grave-yard thereon, began more than eight or nine years prior to the institution of this suit, a period far short of the period of limitation. Appellants claiming in their bills under the deed from Munford and wife, and under that deed alone, through the school trustees, the erection of a part of the church building on appellee's land, and the mere encroachment of a part of the grave-yard thereon, has not and never can ripen into a good title,

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from the fact that it had its origin in a mistake, and not a claim of right from the beginning. The colored people who built the church thought that they were putting it entirely upon the school-house property, as conveyed to the school trustees by Munford and wife. They thought that the grave-yard was on that land, and did not for a moment think that they had a right to more land than was conveyed by that deed to the school trustees. The school trustees undertook to give them the right to occupy no land except what was conveyed by that deed. So that the fact that appellee Owen thought that the church and grave-yard were on the school-house lot, and for that reason made no objection to the erection of the church or the burial of the dead, does not estop him now from asserting his rights when he has ascertained for the first time that there has been such encroachment, and for the first time has learned exactly where the line between the school-house property and his property is located.

In the amended bill filed by appellants is an allegation which, of itself, if more than what has been stated were needed, is conclusive that the relief they seek in this litigation was properly denied, viz.: that "very soon after said land (the school-house lot) was conveyed, as aforesaid, the colored people of Forest District, near the property in the bill mentioned, organized a church or religious congregation by the name of Altha Grove Baptist Church, and said congregation, with the consent and co-operation of the trustees mentioned in said deed (i. e., the trustees of Forest School District), jointly built a house on said land for the purpose of holding religious services therein and teaching public school." In other words, by appellants' own showing, they have no title whatsoever to the land which is the subject of this controversy, but the title thereto is in the trustees of Forest School District as to the school-house lot, and outside of that they make no sort of claim to any part of the land of appellee Owen; and it is through these trustees and subordinate to their rights that the colored people of Forest

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School District obtained permission to build a church on the school-house lot for the purpose of holding religious services therein and teaching a public school.

As was held in *Clarke v. McClure*, 10 Gratt. 305: "Where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession which could silently ripen into title by adverse possession under the statute of limitations."

"Where one went into possession of land with the verbal consent of the owner, his possession could not ripen into a title in the absence of a clear, positive and continued disavowal of the owner's title brought home to his knowledge." *Thompson, d'c. v. Camper*, 106 Va. 315, 55 S. E. 674, and authorities there cited.

Again, appellants put themselves in an inconsistent position when they claim in the argument here that they are "the legal successors to the trustees mentioned in the deed from Munford and wife, while in their pleadings they admit that the successors to the school trustees named in "Exhibit A," filed with their amended bill, (deed from Munford and wife to the school trustees of Forest District) are E. N. Nelson and two others named, being the same persons who were the school trustees of Forest District at the time this suit was brought, made parties to the amended bills, and have answered as stated.

The decree appealed from is without error and will, therefore, be affirmed.

*Affirmed.*

**Staunton.**

## THE DOUGLAS LAND CO. &amp; ANOTHER v. T. W. THAYER CO.

September 12, 1907.

1. BOUNDARIES—*Evidence—Older Patents to Third Persons—Common Designation of Adjacent Tracts.*—The lines of older patents to third persons, which are referred to in a deed of partition between the heirs of an adjacent owner, are relevant evidence to sustain the theory of one of the parties as to the true line between them; and where the patents and deeds in the line of title of the land partitioned refer interchangeably to two tracts in part adjacent to the lands in controversy as the H. and F. land, evidence is admissible to prove that both tracts were sometimes called the H. land.
2. BOUNDARIES—*Corner of Adjacent Tract—Statements Acted On.*—Where it becomes important to establish the location of a corner of tract of a third person in part adjacent to the lands in controversy, which corner is in the controverted line, the fact that the owner of said tract points out his corner to an agent of one of the parties, who is seeking to establish the true line between the lands in controversy, and that he adopts it and marks it, is relevant evidence when offered against such party, as tending to show the true location of said corner.
3. BOUNDARIES—*Evidence—Surveyor—Reason of Running Line.*—A surveyor who has run a disputed line may, by way of inducement to show why he ran it as he did, testify that it was by direction of counsel of one of the parties given in the presence of the counsel and general manager of the other, who stated that he could "go ahead and run it."
4. BOUNDARIES—*Evidence—Deeds Under Which Parties Claim.*—Where land has been partitioned between two heirs of the former owner, and a part of that assigned to one of the heirs has, through successive conveyances, come to A., and his deed calls for the dividing line between the heir under whom he claims and the other heir as the western boundary of A.'s tract, in a controversy between A. and those claiming under the other heir as to the location of said dividing line, the deed to A. is relevant evidence, as tending to show

## Syllabus.

that those under whom A. holds claimed the location of said dividing line to be the same as now asserted by A.

1. **BOUNDARIES—Evidence—Former Surveys.**—In a controversy over a boundary line, it is admissible to prove that an agent of one of the parties stated that his principal had twice run one of the lines of the tract. It is relevant to show acts done by the party in his effort to locate the lines.
2. **EVIDENCE—Admissibility—Objection by Party who has Proved Same Facts.**—An objection to the admissibility of evidence is unavailable to one who has himself elicited the same facts in the cause.
3. **BOUNDARIES—Evidence—Identical Lines of Junior Patent—Newly-Marked Trees.**—Where the lines and corners of a senior patent have become uncertain, a junior patent, calling for these lines and corners, is admissible, and evidence showing the lines of such junior patent may be received for the purpose of identifying the older lines, and also for the purpose of explaining the presence of newly-marked trees in the older lines.
4. **EVIDENCE—Experts—Opinions Rejected in this case.**—Questions propounded to a surveyor on the witness stand for the purpose of eliciting his opinion as to whether the matter in controversy might not be settled by the location of a designated line, or whether a given marked line is a true line, do not come within the scope of expert testimony, and cannot be asked.
5. **EVIDENCE—Excluding Answer of Witness—Anticipated Answer.**—An exception to the action of a trial court in refusing to permit a witness to answer a question will not be considered by this court, if the bill of exception is silent as to what answer was expected to be elicited.
6. **EVIDENCE—Survivor of Transaction—Death of Agent—Testimony of Third Person.**—The death of the agent of one party will not exclude a third person from testifying as to a conversation with such agent in his lifetime, if the conversation is otherwise competent evidence.
7. **REAL PROPERTY—Parol Disclaimer of Title.**—The acquiescence of the agent of one party in the directions given to a surveyor by counsel of the other party as to the running of a disputed line, is not a parol disclaimer of title of his principal, and the fact of such acquiescence may be shown in evidence.
8. **BOUNDARIES—Evidence—Reputed Corners—Opinion of Witness.**—Parol evidence may be received to prove by general reputation and tradition the location of a corner of a patent more than a hundred years old, but a living witness may not give his individual opinion as to the location of such corner.

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13. EVIDENCE—*Objection to Admissibility—When Too Late.*—An objection to reputation evidence of the location of a corner will not be sustained where similar evidence has already been introduced without objection.
14. BOUNDARIES—*Natural Monuments—Identification—Location of Calls.*—In a controversy over the location of the dividing line between two parcels of land received in the partition of the lands of a common ancestor, where a call in the deed of partition is for a natural monument, witnesses may testify as to the location of the monument and the traditional derivation of its name, in order to identify the monument and locate the call in the partition deed.
15. BOUNDARIES—*Evidence—Leases.*—In a controversy concerning the boundaries of land, leases not shown to cover any of the land in controversy, or to be otherwise relevant, are not admissible in evidence.
16. EVIDENCE—*Objection to Question—Ignorance of Witness on the Subject.*—An exception to the action of the court in excluding a question propounded to a witness, is immaterial where it appears from the answer of the witness that he has no knowledge on the subject.
17. EVIDENCE—*Motion to Strike Out—Specifications of Objections.*—A motion to strike out the testimony of a witness on a particular subject, which has been received without objection, is properly rejected if the party moving fails to point out the specific answer objected to.
18. BOUNDARIES—*Instructions to Jury.*—In a controversy concerning the dividing line between two parcels of land, both of which had belonged to one person and been divided by commissioners between his heirs, an instruction which ignores the theory of defendants that the parties had acquiesced in the line for which they contended, and, without qualification, yields precedence to the supposed intention of the commissioners, without regard to what they may have done in establishing the line in controversy, is erroneous.
19. INSTRUCTIONS—*Partial View of Evidence.*—An instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue.

Error to a judgment of the Circuit Court of Washington county in an action of trespass on the case to recover damages for trespassing on plaintiff's land and cutting trees thereon. Judgment for the plaintiff for \$1,750. Defendants assign error.

*Reversed.*

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Opinion.

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The opinion states the case.

*Daniel Trigg, Fulkerson, Page & Hurt and J. C. Padgett,*  
for the plaintiffs in error.

*White & Penn,* for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This case involves the location of the true dividing line between the lands of Mrs. Monroe and George Douglas, Jr., (predecessors in title respectively of the defendant in error, the T. W. Thayer Company, plaintiff in the lower court, and the defendant, the Douglas Land Company, the plaintiff in error), both of whom derived title from a common source—their father, George Douglas—as established by the commissioners and confirmed by the Circuit Court of Washington county in the suit to partition the lands of George Douglas, deceased, amongst his heirs.

The plaintiff brought an action of trespass on the case against the defendant and its lessee, the Laurel River Lumber Company, to recover damages for the alleged cutting and removing of timber from its premises, and to a judgment against the defendants this writ of error was allowed.

The lands which were the subject of partition consisted of three tracts, one containing 62,800 acres, another 10,712 acres, and the third 13,655 acres. The first two tracts, which embrace the land in controversy, were patented to James Heron, December 14, 1795. The three tracts were divided into four parcels. The eastern portion of the largest tract was allotted to William Douglas; the central portion to Mrs. Cruger; and the western to Mrs. Monroe, while the two smaller tracts were allotted to George Douglas, Jr. The partition was confirmed in 1846, and carried into deeds in severalty by a special commissioner appointed by the court for that purpose. The deed to Mrs. Mon-



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roe calls for the northwest and southwest corners of the 62,800 acre tract, and also for the eastern lines of two older patents, Hunt's and Furman's. The calls in the deed to George Douglas, Jr., are for the northeast corner of the Hunt patent and Mrs. Monroe's western division line. The disputed lines are from "M" to "C" (contended for by the plaintiff), and from "O" to "5," and thence to the end of the dotted line (claimed by the defendants), as shown on the "Buchanan Map," a copy of which is filed with this opinion.

The action of the court in admitting in evidence the Hunt and Furman patents, constitutes the first ground of exception.

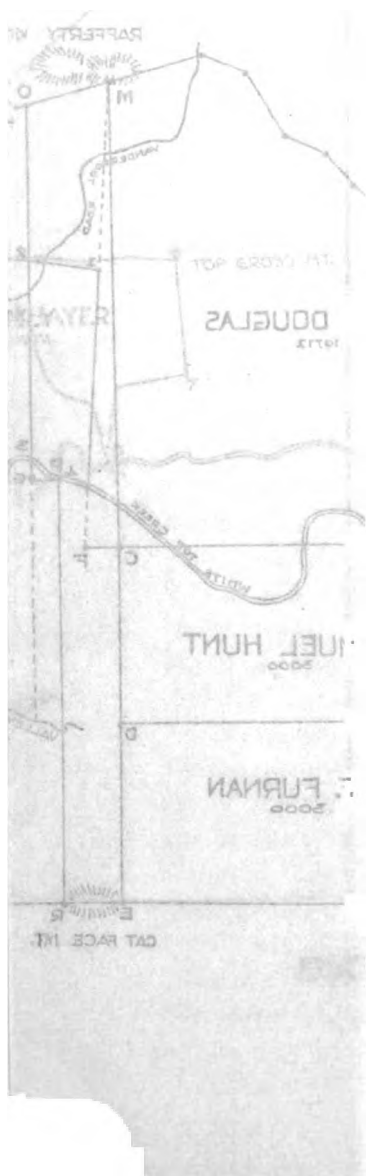
As remarked, the lines of these patents are called for in the partition deeds, and they are, therefore, relevant evidence to sustain the theory of the plaintiff as to the true line between the claimants. The land included in the Furman patent adjoins the Hunt patent on the south, and the eastern boundary lines of the two patents are coincident, and, according to the claim of the plaintiff, constitute in part the western line of the 62,800 acre patent. The patents and deeds in the line of the Douglas title refer to the Hunt land and Furman land interchangeably as the Hunt and Furman land, and evidence was admissible to prove that both tracts were sometimes called the Hunt land.

The next exception is to the admission of the testimony of the surveyor, Buchanan, that the Debusks, who owned part of the Hunt land adjoining the Douglas land, pointed out to General Greever the northeast corner of the Hunt patent at "C."

Greever was the agent of the defendant, the Douglas Land Company, and was endeavoring to determine the true line between Mrs. Monroe and Douglas, and there was evidence tending to show that he adopted the corner at "C," and marked timber to identify it. This evidence was admissible as conducing to establish the plaintiff's claim that the line from "M" to "C" was the correct line.

In *Harriman v. Brown*, 8 Leigh 706, Judge Tucker observes "It is not the mere declaration of Milburn that the witness





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gives in evidence, but it is an act, to-wit, the shewing of certain corner trees, which the general reputation of the neighborhood fixed upon as the corners to Harriman's land. \* \* \* Even if Milburn's shewing certain trees as the corners of the land, was not evidence to establish them as corners, the fact that he pointed out trees, which, by other evidence, are established as true corners, could not be rejected."

The objection to the testimony of the same witness that he had received direction from plaintiff's counsel to run the line from "M" to "F" is also without merit. The instruction was given in the presence of counsel for the defendants and their general manager, and the latter likewise directed the running of the line. But it was also proper, by way of inducement, to show why the witness ran the line.

There was, moreover, an exception to the admission of what is known as the Clement deed. That deed embraced 2,574 acres of the western portion of the land allotted to Mrs. Monroe, and called for the dividing line between that allotment and the defendant's land as its western boundary, and was relevant as tending to show that Clement's vendors, who were vendees in the line of Mrs. Monroe's title claimed the line "M" to "F" as their western boundary line.

The next objection was to the admission of the statement of the witness Buchanan that he had heard General Greever say that the Douglas Land Company had twice run the northern line of the 62,800 acre patent.

We think this was relevant evidence to show acts done by the defendant, in its efforts to locate its lines. But, if the testimony were objectionable, the same fact was elicited by the defendant, and consequently cannot be availed of. *Thornton v. Garr*, 87 Va. 315, 12 S. E. 753; *Va. & S. W. Ry. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33.

Exception 9 was to the introduction of the Fulton entry of April 8, 1837.

There was evidence going to prove that the lines and corners

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of that entry were identical with the calls of Hunt's patent, and it was offered to explain the presence of newly-marked timber in the lines of that patent; and besides, the evidence is admissible, because some of the marked trees in the entry are called for in the partition deeds.

In *Clement v. Packer*, 125 U. S. 332, 31 L. Ed. 721, 8 Sup. Ct. 907, it was held that, where the lines and corners of a senior patent had become uncertain, evidence showing the lines of a junior patent, which called for those of the senior patent, was admissible, not as controlling, but to aid in identifying the older lines.

Exceptions 10, 11 and 12 are to the action of the court in refusing to permit the witness Buchanan to answer certain hypothetical questions.

It is sufficient to say, with respect to those exceptions, that the questions propounded were not within the scope of expert testimony, and, if they had been, the record is silent as to what answers were expected to be elicited. *Hollerman v. Meisel*, 91 Va. 143, 21 S. E. 658.

Exception 13 involves the action of the court in overruling the motion of the defendant to exclude the testimony of the same witness with reference to the direction given him by Watson, general manager of the Douglas Land Company, to run the line from "M" to "F," on the ground that Watson was dead, and, furthermore, that he had no authority to make a parcel disclaimer of the title of his principal.

The ruling was right in both particulars. Buchanan's connection with the case was merely as surveyor and witness, and he had no interest whatever in the litigation. In no sense was he a party to the controversy, and, hence, the rule of exclusion invoked was not applicable. Nor was the direction alleged to have been given by Watson a disclaimer of title in his principal. It was only an acquiescence on his part to running a line which might throw light on the question at issue.

Exceptions 14 and 14½ involve the admissibility of parcel

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evidence to prove by general reputation and tradition the southwest corner of Furman's patent, which issued in 1788, and the old line between Virginia and Tennessee. It is well settled that such evidence is admissible. *Harriman v. Brown, supra; Clements v. Kyle*, 13 Gratt. 468, 477. But in this instance, also, similar evidence of the location of the corner had been introduced without objection; and, therefore, under the authorities cited, the exception cannot avail. We think, however, that the opinion of the witness Mock that the corner was on the old state line, was not competent evidence, and ought to have been excluded.

Exceptions 15, 16 and 18 challenge the admissibility of Mock's and Lewis' testimony of what the Debusks had told them concerning the location of the eastern line of the Hunt patent.

In view of the fact that evidence had already been introduced tending to prove that these parties had made similar statements to General Greever, agent of the Douglas Land Company, which had been acted on by him, it is not perceived that the admission of this evidence could have been prejudicial.

Exception 17 is to the admission of the testimony of Lewis that the line between Douglas and Clements was plainly marked.

This objection is founded on the fact that the line had been comparatively recently marked, and that the evidence was self-serving. That question is settled adversely to the exceptor by the case of *Clement v. Packer, supra*.

Exception 19 is to the action of the court in overruling the objection to a question propounded to the witness Lewis, with respect to the location of the cliff and traditional origin of the name "Cat Face," a projection of rocks on the western slope of Pound Mountain.

The call in the partition deed to Monroe and wife, after leaving the Hunt and Furman line, is for a line east 400 poles over "Cat Face," to a beech and sugar tree on the dividing

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ridge. Several witnesses testified to the location of that natural monument and the traditional derivation of its name—that the caverns on its face afforded dens to wild-cats. We think the evidence was admissible to identify the cliff and locate the call in the partition deed.

Exception 20 questions the admissibility of the Fulton entry, and is controlled by what was said in regard to exception 9.

We are of opinion that the leases referred to in exceptions 21 and 22 were rightly excluded. It was not shown that either of them covered the land in controversy, nor did their relevancy otherwise appear.

There is no avowal of what answers were expected to the questions whose exclusion is made the ground of exceptions 23 and 24, and, if material, as before observed, the objection could not be considered.

The answer of the witness to the question, the exclusion of which constitutes exception 27, "that he did not know whether there was any controversy over the land referred to," shows that the exception was immaterial.

Exception 28 is to the refusal of the court to strike out the cross-examination of the witness Mock "wherein he speaks of what Mr. White told him of the controversy having been settled." The exception is amenable to the objection that the exceptor has omitted to point out the specific answers objected to, and for that reason, it cannot be regarded. *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Hughes v. Kelly*, 2 Va. Dec. 588, 30 S. E. 387.

We are of opinion that the question and answer which were admitted by the court over the objection of the defendant (exception 29), were merely intended to explain the attitude of counsel in the matter involved, and could not have prejudiced the defendant.

The remaining exceptions (save only the last, which is to the refusal of the court to set aside the verdict as contrary to the law and evidence) are to the giving and refusal of instructions.

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It is unnecessary to prolong this opinion by specific consideration of these assignments of error. We shall content ourselves with calling attention to one of the instructions which the court gave, the unqualified language of which would naturally have induced the jury to give predominance to what they may have believed the commissioners intended, without regard to what they may have done in establishing the line in controversy. The controlling inquiry in the case at last, is the ascertainment of the line fixed by the commissioners and confirmed by the court; and that fact, if proved and acquiesced in by the parties, would take precedence over any presumed intention of the commissioners. On the other hand, the intention of the commissioners to be gathered from the partition proceedings, in connection with the facts and surrounding circumstances, constitutes an important factor in aiding the jury to determine the correct location of the line.

In *Smith v. Davis*, 4 Gratt. 50, the commissioners intended the dividing line to be a straight line between known corners, and directed the surveyor so to run it; but the land was in forest, and the surveyor, without intending it, ran and marked a curved line. The court approved an instruction which told the jury that, if they believed from the evidence that the commissioners intended to run the division line as a straight line between ascertained corners, then a straight line was the true division line, unless they should believe from the evidence that the parties had agreed to and acquiesced in the crooked line. The court also held an instruction erroneous which charged the jury, that if the division line was actually run and marked at the time the division was made, and that the line thus made was the crooked line laid down on the plat returned by the surveyor, the crooked line should prevail, although the call of the plat and report of the commissioners was for a straight division line. It will thus be observed that the instruction which the court approved modified the effect which the jury were to allow the intention of the commissioners by acquiescence of the



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parties in the curved line run and chopped through mistake by the surveyor.

So, in this case, an instruction which ignores the theory of the defendants, that the parties had acquiesced in the line for which they contend, and without qualification yields precedence to the supposed intention of the commissioners, is erroneous. See cases cited in note to *Smith v. Davis*, 4 Gratt. (Va. Rep. Ann.) 36, and *Elliott v. Horton*, 25 Gratt. 766, 772.

The prayer in question also contravenes the doctrine of that line of decisions which holds that "an instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue." *Seaboard &c. Ry. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593; *Montgomery's Case*, 98 Va. 852, 37 S. E. 1; *Boush v. Fidelity &c. Co.*, 100 Va. 735, 42 S. E. 877.

We are of opinion that, in so far as the ruling of the circuit court in giving and refusing instructions at the previous trial, is in conflict with the views expressed in this opinion, it is erroneous. For this reason, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

*Reversed.*

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Statement.

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**Staunton.****EMERSON AND OTHERS v. STRATTON.**

September 12, 1907.

1. **VENDOR AND PURCHASER—Sale in Gross—Evidence.**—Every sale of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the parties intended a sale in gross, is presumed to be a sale by the acre. This presumption, however, may be overcome by evidence that the parties agreed to be governed at all events by the estimated quantity. Such evidence does not contradict or vary the deed, but merely establishes an understanding collateral to the written contract, and makes it clear that no such mistake was made as furnishes ground for relief in equity.
2. **VENDOR AND PURCHASER—Sale in Gross—Lump Sum—Lapse of Time—Frequent Alienations.**—When the purchase price for land is not an equi-multiple of the number of acres, it is, at least, persuasive evidence that the contract was not by the acre. If, in addition to this, a round sum is stated in the deed as the consideration for the land, and it is not clearly proved that there was any mutual mistake as to the quantity, and there has been great lapse of time since the alleged mistake was made, and frequent alienations of the property founded on the assumption that there was no mistake, a court of equity, in the absence of any allegation or proof of fraud, will hold the transaction to have been a sale in gross and not by the acre.
3. **VENDOR AND PURCHASER—Recovery for Excess of Land—Immediate Vendee.**—The recovery, if any, of a vendor for the value of the excess of land sold by the acre over the quantity actually paid for, must be, in the first instance, against his vendee, before attempting to subject the land in the hands of a remote purchaser for value without notice of the claim.

Appeal from a decree of the Circuit Court of Wise county.  
Decree for complainant. Defendants appeal.

*Reversed.*

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The opinion states the case.

*Ayers & Fulton* and *T. E. Ellison*, for the appellants.

*Bond & Bruce* and *Vicars & Peery*, for the appellee.

HARRISON, J., delivered the opinion of the court.

This record shows that in April, 1887, J. F. Johnson and wife sold and conveyed to F. A. Stratton 83.50 acres of land, more or less, in Wise county, at \$2 per acre. It further appears that, in the same month and year, E. M. Fulton, as commissioner of the Circuit Court of Wise county, conveyed to F. A. Stratton, at the request of Mrs. Johnson, the grantor in the deed first mentioned, two tracts of land in the same county, containing 1,064.50 acres, which she had purchased for \$599.65 under a decree of the court in a chancery suit then pending. This conveyance described the land conveyed as 1,064.50 acres, more or less, and by metes and bounds, as shown by a survey thereof which Mrs. Johnson had caused to be made.

In July, 1888, F. A. Stratton and wife conveyed, by one deed, these lands to H. M. Herbert. In this deed the two tracts are described separately by the same metes and bounds already mentioned, and as containing 83.50 acres, more or less, in the one case, and 1,064.50 acres, more or less, in the other. The consideration stated on the face of this deed, is the lump sum of \$5,400 for the two tracts, aggregating 1,148 acres. In December, 1894, H. M. Herbert and wife conveyed the same two tracts of land, by the same description, to Albert E. Emerson. the consideration stated on the face of this deed being the lump sum of \$5,100, or \$300 less than the grantor had given. In December, 1898, Albert E. Emerson and others sold and conveyed the same boundary of land to N. B. Dotson, the present owner.

The bill in this case was filed in August, 1903, by F. A.

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Stratton, the grantor in the deed made in 1888, to H. M. Herbert, against the appellant, Albert E. Emerson, and others, alleging that he had recently and within the preceding year, learned that the lands conveyed by him to H. M. Herbert as 1,148 acres, had since been accurately surveyed and found to contain 1,267.69 acres, or 119.69 acres more than he and his grantee supposed at the time he sold and conveyed the same; that he had sold the land at \$4.70-110/287 per acre, making the aggregate of \$5,400, which was the lump sum stated on the face of the deed to be the consideration; that, at the time of the execution of the deed, both he and his grantee believed that the land conveyed was only 1,148 acres, and that the true acreage and consideration was omitted from the deed by the mutual mistake of both; that the excess of land at \$4.70-110/287 per acre would amount to \$563, with interest thereon from the date of the deed; and the prayer is, that the complainant may have a decree for \$563 and interest thereon from July 2, 1888, and that the land, or so much thereof as may be necessary, shall be sold to satisfy the same.

The record shows that 20.37 acres of this land belonged, by paramount title, to O. M. Vicars and others, so that, if the complainant was entitled to recover at all, it could only be for an excess of 99.32 acres instead of 119.69 acres.

The appellants, Albert E. Emerson and others, filed their answer to this bill, specifically denying that the lands were sold by the complainant, Stratton, to H. M. Herbert at the price of \$4.70-110/287 per acre, that such sale was by the acre, that there was any mistake by which the true acreage and consideration were omitted from the deed, and that there was any mistake whatsoever in the deed for which the same should be reformed or corrected. They further aver that they are innocent purchasers of the land, without notice of the pretended claim of F. A. Stratton to a lien thereon, which neither of them ever heard of until the institution of this suit, long after they had purchased the land, paid in full therefor, and received and

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recorded a deed for the same from their vendor, H. M. Herbert.

At the December term of the circuit court, Ellender M. Johnson, the vendor of the land to the complainant, F. A. Stratton, was allowed to file her petition in the cause, in which she alleges that her sale to the complainant, Stratton, was by the acre; that she sold the several tracts, described as containing 1,148 acres, to Stratton at \$2 per acre; and alleging a mistake and recent discovery thereof substantially as claimed in the bill of Stratton, and claiming that by reason of the excess now shown to exist, she is entitled to recover the value thereof at \$2 per acre, with interest.

The appellants filed an answer to this petition, in which they admit that petitioner sold the 83.5 acres of land, described in the deed of April, 1887, to F. A. Stratton by the acre, but they deny that the 1,064.50 acres, which was conveyed to Stratton by the commissioner at the request of petitioner, was a sale by the acre, and insist that it was a sale by the boundary. They deny generally all equities alleged in the petition, and insist that they are innocent purchasers of the land in question for a valuable consideration, without notice or knowledge of the petitioner's pretended claim.

At the November term, 1906, the circuit court decreed that the sale by Stratton to Herbert was a sale by the acre, and not in gross; that the sale by Mrs. Johnson to Stratton was also a sale by the acre, and not in gross; that the excess in acreage was 119.69 acres, less 20.37 acres; that F. A. Stratton was entitled to compensation from H. M. Herbert at \$4.70-110/287 per acre for such excess, and Ellender M. Johnson was entitled to compensation for the same at the rate of \$2 per acre; that Stratton had a lien on the land, except the 20.37 acres, for \$467.20 with interest thereon, from July 2, 1888; and that Mrs. Johnson was entitled to \$198.64, with interest, from April 8, 1887, to be paid out of the recovery in favor of her vendee, Stratton. The decree then appointed a commissioner to sell the lands, except the 20.37 acres, or so much thereof as should

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be necessary, unless the lien thereby established should be paid within thirty days. From this decree the present appeal was allowed.

While contracts of hazard are not invalid, they are not regarded with favor by courts of equity. Every sale, therefore, of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the parties intended a sale in gross, must be presumed to be a sale by the acre. *Berry v. Fishburne*, 104 Va. 459, 51 S. E. 827; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829. This presumption, however, may be met and overcome by proof that the parties agreed to be governed at all events by the estimated quantity. Such proof does not contradict or vary the deed in any particular; it merely establishes an undertaking collateral to the written contract, and makes it clear that no such mistake was made as furnishes ground for relief in equity. *Blessing v. Beatty*, 1 Rob. 287; *Caldwell v. Craig*, 21 Gratt. 132. *Boschen v. Jurgens*, 92 Va. 756, 24 S. E. 390.

In the case of *Blessing v. Beatty*, *supra*, Judge Baldwin says: "The principle upon which equity gives relief in such cases of deficiency or excess in the estimated quantity upon the sale of land, I understand to be that of mistake; whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other."

The mistake must be clearly proved, especially in a case like this, where there has been so great a lapse of time and such frequent alienations of the property, founded on the assumption that there was no mistake. *Jones v. Tatum*, 19 Gratt. 736.

In the case at bar, no fraud is alleged or proven. The complainant founds his case upon the ground that both he and his grantee were mistaken as to the number of acres the land contained. We are of opinion that the facts established satisfactorily show, that the deed of July, 1888, from F. A. Stratton to H. M. Herbert was not intended by the parties as a consummation of a sale by the acre of the land thereby conveyed. Under

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the case made by the bill, Stratton sold the land to Herbert at \$4.70-110/287 per acre. To say the least, this is a most unusual, if not remarkable, price per acre to have been agreed upon for land. The price by the acre is not stated in the deed, but the round sum of \$5,400 is given as the consideration for the land conveyed. When the purchase money for land is not an equi-multiple of the number of acres, it is, at least, persuasive evidence that the contract was not by the acre. *Keytons v. Brawfords*, 5 Leigh 41, 53; *Jones v. Tatum*, *supra*; *Farrier v. Reynolds*, 88 Va. 141, 147, 13 S. E. 393.

Every material allegation of the bill is denied by the answer. There is no proof to sustain the allegation of mutual mistake, upon which the complainant grounds his right to recover. On the contrary, the testimony of H. M. Herbert distinctly disproves such allegation, and shows clearly that the real transaction between the parties was an exchange of the land conveyed for Indiana property consisting of land, town lots and houses, in which exchange Herbert paid Stratton a difference of about \$1,400 in money; and further, shows that no mistake occurred between Stratton and Herbert as to the true acreage; that the sale was by the boundary; and that Stratton stated at the time that he did not know the correct acreage, but thought the land would run out more than 1,148 acres on an accurate survey. This evidence stands uncontradicted by anyone. After more than fifteen years of silent acquiescence in the sale that he made, Stratton is not put on the stand to question the truth of the statements made by his immediate grantee.

Without considering other strong corroborative circumstances, we think the uncontradicted testimony of Herbert alone is sufficiently clear and explicit to overcome the presumption that the sale in question was by the acre, and to show that the quantity did not influence the price paid for the land. The record justifies the conclusion that Stratton was willing to take in the Indiana property at about \$4,000; that he wanted about \$1,400 in money, and to get the matter closed, was willing to reduce

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the price of his land from \$5,500, the sum originally asked, to \$5,400, the sum finally agreed upon as the value in gross of the tract of land he was selling.

If Mrs. Ellender M. Johnson, the vendor of F. A. Stratton, is entitled to recover anything, as to which we express no opinion, her recovery must be, in the first instance, against her vendee.

Having reached the conclusion that there can be no recovery in favor of the complainant, F. A. Stratton, the decree appealed from must be reversed, and this court will enter such decree as the circuit court should have entered, dismissing his bill with costs.

*Reversed.*



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**Staunton.****HART AND OTHERS V. DARTER AND OTHERS.**

September 12, 1907.

1. **EQUITY JURISDICTION—*Mere Construction of Wills and Deeds.***—In order to give a court of equity jurisdiction to take cognizance of and construe a will, there must be an actual litigation in respect to a matter which is a proper subject of jurisdiction of a court of equity as distinguished from a court of law. The mere construction or interpretation of wills and deeds which devise or convey purely legal estates or interests, is not of itself a ground of equity jurisdiction. The power to construe such writings is simply an incident to the court's jurisdiction over a case on some one of the recognized grounds of equity jurisdiction.

Appeal from a decree in chancery of the Circuit Court of Scott county. From a decree dismissing the bill, the complainants appeal.

*Affirmed.*

The opinion states the case.

*Richmond & Bond*, for the appellants.

*W. S. Cox*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

In the year 1882, the will of Eyre Hart, deceased, was admitted to probate. The object of this suit, which was instituted by certain of the devisees under the sixth clause of the will, was to have that clause, which is as follows, construed:

"I will all my lands to my 6 living children, Elizabeth Hobbs

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has received her full *portion* of all I possess, my living children W. H. Hart, B. F. Hart, M. Doniho, M. S. Darter, J. B. Helton, Virginia Hart, and if one sells, sell it to one of six, and if one dies with *esue*, its part shall go to the other children."

The trial court, upon a hearing of the cause, dismissed the bill without prejudice to the rights of any party, upon the ground that the case was not in such a condition as to permit a decision of the matter in issue.

It appears from the record that the devisees under the sixth clause of the will partitioned the land devised them, and took possession of their respective shares; that all the devisees are living, some having children, and others none; that some have aliened their interest in the land devised to persons other than devisees. The bill alleges that doubt and uncertainty exist as to the exact rights of the parties in the land devised, which greatly encumber and hamper the complainants in dealing with their interest in the same, and that the complainants are advised that it is necessary, in order to ascertain the respective interests of the devisees, to have the will judicially construed. The prayer for relief is that the court will construe the sixth clause of the will, and adjudge that the words "with *esue*" therein be held to mean "without issue," and determine whether the devisees who have attempted to alien their interest had a legal right to sell to persons other than the devisees under that clause; to determine any other matter deemed pertinent by the court or required by any party in interest; and for general relief.

While the bill prays for general relief, it is clear from its allegations that the suit was brought solely for the purpose of having the sixth clause of the will construed by the court, and that no case is made for further relief. The first question, therefore, to be determined, is whether or not a court of equity has jurisdiction of the case made.

The courts are not in accord as to the ground of the jurisdiction of a court of equity to interpret and enforce the provisions of a will. Some hold that such jurisdiction is merely an

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incident to its general jurisdiction over trusts, and that it will not exercise its powers to construe a will which only deals with and disposes of purely legal estates or interests in land, and makes no attempt to create any trust relation in respect to the property devised; others hold that its jurisdiction arises from the complicated character of the provisions of the will, from the difficulty of understanding their meaning, and from the doubt and uncertainty as to the rights of the parties claiming under them. See 3 Pom. Eq. Jur., secs. 1155 to 1157, and cases cited; Note to *Crosson v. Dwyer*, 2 Am. & Eng. Dec. in Eq. 687-690 and cases cited. But the prevailing doctrine in this country is that, in order to give a court of equity jurisdiction to take cognizance of and construe or interpret a will, there must be an actual litigation in respect to a matter which is the proper subject of jurisdiction of a court of equity as distinguished from a court of law.

Pomeroy, in discussing this question, says (sec. 1156), that "the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is, that the special jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought *solely* for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated."

In the case of *Chapman v. Montgomery*, 63 N. Y. 221, 230, it is said: "The rule is that, to put a court of equity in motion, there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court as distinguished from a court of law. It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers as an incident to that jurisdiction take cognizance of and pass upon the interpretation of wills. They do not take

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jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy." 3 Pom. Eq. Jur., sec. 1155.

In this State, as in England, courts of equity have jurisdiction over the administration and settlement of decedents' estates, whether the deceased die with or without a will, and in the exercise of and as incident to that jurisdiction, they construe and enforce wills of personal property. See Pom. Eq. Jur., sec. 1155; *Adair v. Shaw*, 1 Sch. & Lef. 243, 262; *Nelson v. Cornwall*, 11 Gratt. 724, 737.

The English courts of chancery, under their general jurisdiction over trusts, had the power to construe and enforce wills of real as well as of personal property, so far as they create or their disposition involves the creation of trusts; but "so far," says Pomeroy, "as a will of real property bequeaths purely legal titles and the devisees therein obtain purely legal titles to the land given, the enforcement thereof belongs to the courts of law by means of the action of ejectment, the courts of law having full power to construe and interpret the instrument and to determine the rights of the devisees; there is no necessity, and, therefore, no power, of resorting to a court of equity in order to obtain a construction of such wills." Sec. 1155. *Bowers v. Smith*, 10 Paige 193; 16 Cyc. 54-101.

No case involving the precise question now under consideration has been before this court, but, in the case of *Snyder v. Grandstaff*, 96 Va. at p. 482, 31 S. E. 647, it was treated as settled law by the learned circuit judge, who decided the case and whose opinion was approved and adopted by this court, that the construction or interpretation of wills and deeds was not of itself a ground of equity jurisdiction, but that the power to construe such writings was simply an incident to the court's jurisdiction over a case on some one of the recognized grounds of equity jurisdiction. This view, as we have seen, is in accord with correct principles, is sustained by the weight of authority,

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and should be adhered to, although, perhaps, not necessary to a decision of that case.

The clause of the will which this suit was brought to have interpreted, whatever the interest given be, it is clear, disposes of purely legal estates or interests, and makes no attempt to create any trust relation in respect to the land devised. There being no trust relation involved in the devise, and no other ground of equity jurisdiction shown, the bill was properly dismissed by the circuit court, and its decree must be affirmed.

*Affirmed.*

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**Staunton.****ISAAC EBERLY & Co. v. GIBSON AND OTHERS.**

September 12, 1907.

1. **ESTOPPEL—Assignment Induced by Debtor—Promise to Pay Assignee—Fraud.**—If a debtor induces a third person to take an assignment of his notes by his assurance made beforehand that “the notes are all right,” or if, after assignment and notice thereof, the debtor expressly or impliedly promises the assignee to pay the notes, and the retraction of such promise would operate as a fraud upon the assignee, in either event the debtor is estopped from setting up any equity or defense he may have against the assignor, however well founded it may originally have been. After the notice of the assignment and the promise to pay to the assignee, no subsequent transactions between the assignor and the debtor can invalidate the notes in the hands of the assignee.

Appeal from a decree of the Circuit Court of Buchanan county. From a partial decree in favor of the complainants, they appeal.

*Reversed in part.*

The opinion states the case.

*Routh & Routh* and *Williams & Witten*, for the appellants.

*Finney & Stinson*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

It appears that Paris Charles was, on June 3, 1904, and prior thereto, engaged in the retail mercantile business, buying his

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stock from wholesale merchants in the usual manner; that on the date named he sold his stock of merchandise in bulk, invoicing at \$1,700.44, to B. G. Gibson; that Charles was indebted to the Isaac Eberly Company, complainant in the court below, and appellant here, a wholesale company, in the sum of \$995.35 for goods sold him; that Charles was indebted to other merchants in various sums for goods equal in value to the stock sold to Gibson; that the sale to Gibson was not in the ordinary course of trade, but with the intent on the part of Charles to quit the mercantile business; that Charles and Gibson made no inventory of the goods at the time of the sale, as required by the statute (now section 2460a, Va. Code, 1904), nor complied with any of the other provisions of the statute; that Gibson paid Charles on the stock of goods that day taken possession of by Gibson, \$400 in cash, two mules at the value of \$400, and executed notes for the balance of the purchase money to Charles, two of which notes (one for \$300, due eight months after date, June 3, 1904, with interest from date, and another for \$300, bearing the same date, due twelve months after date, with interest from date), were, on July 14, 1904, duly assigned by Charles to appellant for a valuable consideration, and when collected, were to go as a credit on the debt of Charles to appellant, above mentioned; that after the assignment of these notes and on the same day, Gibson was notified by appellant of the assignment, and he assured appellant that the notes were all right and promised that he would pay them at maturity, even going to the extent of saying that he would pay them before maturity if a discount would be allowed upon them, but refused to give any security for their payment. At this interview between appellant's agent and Gibson, the latter's attention was called to the statute above referred to, which provides that it shall be unlawful for any merchant buying and selling merchandise, while he is indebted to any person, to sell his entire stock of merchandise in bulk, or to sell the major portion thereof otherwise than in the ordinary course of trade,

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in the regular and usual prosecution of the seller's business, etc., and that if the terms of the statute prescribing in what manner and under what conditions a merchant engaged in buying and selling merchandise may sell his entire stock in bulk, or the major portion thereof otherwise than in the ordinary course of business, etc., were not complied with, the sale would *prima facie* be presumed to be void and fraudulent as against the creditors of such seller, and the merchandise, or such other part thereof, as might be found in the hands of the purchaser, should be liable to the creditors of the seller; and in the event that the same, or any part thereof, be withdrawn by the purchaser, then the purchaser himself should be liable to the creditors of such seller for the merchandise so received by him and thus withdrawn. Upon obtaining this information from appellant's agent, Gibson declared that he did not know of the statute, and that he was sorry that he did not know of it sooner, as he had paid off one of the notes executed by him to Charles, the note so paid off being held by an assignee of Charles other than appellant, or Charles himself. On the following day, namely, the 15th of June, 1904, Gibson executed, delivered and had recorded in the clerk's office of Buchanan county, a deed to his wife, conveying to her, in consideration of \$800, said to have been in hand paid, a tract of land situated in that county, containing two hundred and three acres; and, on July 30, 1904, notwithstanding declarations on his part to the agent of appellant that he still had the stock of goods in question in possession, and intended to hold on to them, he made a pretended resale of what remained back to Charles, without any pretence of complying with the provisions of the statute, *supra*; whereupon Charles, on the same date, executed to one C. W. McCoy, trustee, a deed of trust on this stock of goods to secure to the creditors of Charles, other than appellant, the one \$1,100, and the other \$466. It further appears that, from the time Gibson obtained this stock of goods from Charles, on the 3rd day of June, 1904, to the date of his pretended resale of the



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same to Charles, on July 30, 1904, he had sold of the goods the amount of \$235.77; so that the invoice price of the goods at the pretended resale to Charles was \$1,464.67.

At the second August rules, 1904, appellant filed its original bill in this cause (which is the only bill copied in this record), setting out the foregoing facts, and relying upon them as showing that the deed from Gibson to his wife, as well as the pretended resale of the stock of goods by Gibson to Charles, were fraudulent transactions, made and had for the purpose of defrauding the creditors of Charles, especially appellant, and charging that Gibson was liable to appellant not only for the \$235.77 realized by him from the sale of a part of the goods while in his possession, but for the two notes of \$300 each, above mentioned, and that appellant was entitled to a lien therefor upon the tract of land which Gibson had fraudulently conveyed to his wife.

Upon the hearing of the cause upon the bill, the answer of Gibson, and depositions of witnesses, the circuit court held that appellant was not entitled to recover of Gibson the amount of the two notes of \$300 each, executed by Gibson to Charles, and by the latter assigned to appellant and sued on, but that Gibson was liable to the creditors of Charles for the difference between the amount of the goods turned over to him by Charles and the amount of the goods returned to Charles by Gibson, namely, the difference between \$1,700.44 and \$1,464.67, and interest thereon; and that the same should be paid to appellant, the first and only creditor attacking that transaction; and it was adjudged, ordered and decreed that appellant recover of Gibson the sum of \$235.77, with interest thereon, from the 30th day of July, 1904, until paid, and costs of its suit; and that, as to this recovery the deed executed on the 15th day of July, 1904, by Gibson to his wife, Cordelia Gibson, conveying certain lands therein described, was not made for a consideration deemed valuable in law, but was made with intent to hinder, delay and defraud appellant, as a creditor of B. G. Gibson, and,

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therefore, was fraudulent and void as to its debt against Gibson; and that this decree be a lien upon the lands in question, to be enforced by proper decree to be thereafter entered in the cause.

From this decree the appeal under consideration is taken, and we are asked to reverse it only in so far as it holds that the two notes executed by Gibson to Charles for \$300 each, and assigned by the latter to appellant, are void and uncollectible because of failure of the consideration for which they were executed, the effect of the decree being that the sale of the stock of goods from Charles to Gibson having been made without a compliance with the provisions of the statute, *supra*, the transaction was void, and, therefore, the consideration for which the notes in question were executed, failed.

Besides the fact already mentioned, that after the assignment of these notes to appellant, Gibson not only recognized them as valid obligations, which he was bound in law to meet, but expressly promised appellant that he would pay the notes, the statute does not declare that the sale of the goods was fraudulent and void as to Gibson, the buyer, but only that the sale was *prima facie* presumed to be fraudulent and void as to the creditors of the seller, and further, that the merchandise in the hands of the purchaser, or any part thereof, if it be found in his hands, should be liable to such creditors, and in the event that the same or any part thereof be withdrawn by the purchaser, then the purchaser himself, personally, shall also be liable to said creditors of such seller, to the extent of the merchandise so received by him and thus withdrawn.

The contention of appellant is that, after notice to appellee, Gibson, of the assignment of the notes to appellant, Gibson and Charles could by no subsequent transaction invalidate the notes in the hands of the assignee; and this contention is clearly sound. The notes in the hands of appellant were only subject to any equities between Charles and Gibson prior to notice of the assignment, and it is not pretended by Gibson or anyone else

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that any such equity existed at the time of the assignment, and notice to him on July 14, 1904; and had there been, his express promise to pay, and assurances to the representative of appellant that the notes were all right, would have destroyed even such prior equities, much more any arising after notice of the assignment. This principle is rightly carried in such a case so far as to work an estoppel against the debtor and the assignor. The express promise of Gibson to appellant to pay these notes, and his assurances that they were all right, meant, of course, that he had no prior equities to set up against them, and concluded him as to any right by a transaction with Charles to render the notes void and uncollectible. Had he not attempted to do this, as he gave assurances that he would not do, the goods would have remained in his possession and been liable to appellant for the payment and satisfaction of the notes in question, by virtue of section 2460a of the Code, relied on by the circuit court as giving appellant a lien upon the money received by Gibson from a sale of a part of the goods while they were in his possession.

According to the answer of Gibson, there was no fraud or dishonesty in his purchase of the stock of goods in question from Charles, and hence it was an innocent and valid purchase; therefore, the *prima facie* fraud was eliminated, and Gibson was the owner of the goods free from any consequences and results imposed by the statute, *supra*, under no obligations to the creditors of Charles, and was clothed with the right to hold the goods by payment, either directly to Charles or to his assignee, of the invoice price thereof evidenced by the notes he had given, so that the notes were for a legal and valid consideration, and Gibson could not, by his own act, relieve himself of the express promise to pay them to appellant.

In *Stebbins v. Bruce*, 80 Va. 389, while it is held to be settled law in this State that the assignee of non-negotiable paper stands in the shoes of his assignor and takes subject to all defenses of the debtor against the assignor existing before notice

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of assignment, it is further held that where, after notice of assignment, the debtor expressly or impliedly promises to pay the debt, he is estopped from setting up any defense he had against the assignor. The opinion in that case recognizes the correctness of the statement of the law in the authorities cited, to the effect that, while no acknowledgment made after an assignment will prevent the debtor from proving, if he can, any equity against the assignor before he had notice of the assignment, he will be estopped from setting up any equity or defense, however well founded originally, if by his assurance made beforehand he has induced the assignee to acquire the debt; and that the assignee in general only holds an equitable interest in the assigned instrument. This statement of the law is declared to be subject to the qualification, that where, after notice of the assignment the debtor expressly or impliedly promises the assignee to pay the debt, he will be concluded thereby, if the retraction of such promise would operate as a fraud upon the assignee. "In this and other like cases," says the opinion, "where the assignee has been influenced to act, or to refrain from taking action, by the representations of the debtor, to permit the latter to repudiate those representations to the injury of the former, would be contrary, no less to the well-settled rule of the common law, than to the plainest principles of natural justice. And the same principle prevails in equity."

This qualification of the rule of law in that case applies with full force to the case at bar, for it plainly appears from the facts already stated that the effort on the part of appellee, Gibson, to retract his promise to appellant to pay the two notes in question, operated as a fraud upon the appellant. Relying upon the promises and assurances given by Gibson that the notes were all right, and that he would pay them, appellant took no action to enforce its indebtedness against Charles, and, without any notice whatever to appellant, Gibson permitted the stock of goods to be withdrawn by Charles, so that the latter could and did put them beyond the reach of appellant by con-

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veying title thereto and transferring the possession thereof to a trustee for the benefit of the creditors of Charles other than appellant.

Ignorance of the law could not avail Gibson, and to permit him, under the facts and circumstances appearing in the record, to retract his assurances to appellant with reference to the two notes in question, or to repudiate his express promise to pay them, would operate, in our opinion, as a fraud upon the rights of appellant, and be not only contrary to the established law, but to the "plainest principles of natural justice." *Stebbins v. Bruce, supra*; 2 Min. Inst. 326; 1 Greenleaf on Ev. (15 ed.) sec. 207; 2 Pom. Eq. (3rd ed.) sec. 812.

For these reasons, we are of opinion that the decree of the circuit court, in so far as it holds that the appellant is not entitled to recover of the appellee, B. G. Gibson, the two notes of \$300 each, executed by Gibson to Paris Charles, and by the latter assigned to appellant, is erroneous; and we are further of opinion that appellant is entitled to a lien on the tract of land conveyed by Gibson to his wife by deed of July 15, 1904, for the amount of said notes, with interest thereon from their maturity, as well as the lien for the sum of \$235.77, with interest thereon from the 30th day of July, 1904, until paid, with the costs of this suit, as decreed by the circuit court; therefore, the said decree, to the extent that it denies appellant the right to recover of Gibson the amount of said notes and a lien upon said land as security for their payment, will be reversed and annulled, and the cause remanded to the circuit court to be further proceeded with in accordance with this opinion.

*Reversed in part.*

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**Staunton.****THE LIQUID CARBONIC CO. v. NORFOLK & WESTERN RAILWAY COMPANY.**

September 12, 1907.

1. **CARRIERS—Bills of Lading—Notice of Loss or Damage—Contracts Against Negligence.**—A condition in a bill of lading that claims for loss or damage, shall be made in writing to the carrier's agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after the delivery of the property, or after due time for the delivery thereof, there shall be no liability upon the carrier, is a reasonable provision and will be upheld. Such a provision contravenes no public policy and excuses no negligence, but is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged.

Error to a judgment of the Circuit Court of Wise county in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Vicars & Peery*, for the plaintiff in error.

*Ayers & Fulton, Theodore W. Reath and C. T. Duncan*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This was an action brought in the Circuit Court of Wise county by The Liquid Carbonic Company, a corporation, to re-

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cover from the Norfolk & Western Railway Company for damage to certain goods which the defendant railway company, as a common carrier, undertook to transport from Pittsburg, Pa., and to deliver to the plaintiff at Coeburn, one of its stations in Wise county, Virginia.

The bill of lading contained, among other provisions, the following condition: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

Claim was not made in accordance with this stipulation, nor do we find in the record any evidence of waiver, or other cause why the defendant should not have relied upon it. The question, fairly presented then, is: Does it present a defense to this action?

There was a verdict for the defendant, and the plaintiff in the court below obtained a writ of error from this court; and its petition contains several assignments of error, but also states that, "It is unnecessary to discuss in detail all of the foregoing assignments of error, because if the fourth assignment be well taken, the judgment complained of must be reversed, and if it is not well taken, the other assignments of error are immaterial. We shall, therefore, confine our consideration to this assignment, which brings up for review instruction 'A,' given on behalf of defendant in error, as follows: 'The court instructs the jury that unless they believe from the evidence that the plaintiff, or some one for it, did within thirty days after the delivery of the goods in question to Dingus & Kelly, make claim for its, plaintiff's, alleged damages, and deliver such claim in writing to the agent of the defendant railroad company at Coeburn, Va., they shall find for the defendant'."

By section 12941 of the Code of 1904, it is provided: "Whenever any property is received by a common carrier to be

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transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading in this state, the common carrier, railroad or transportation company, issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States, to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case, shall itself be *prima facie* evidence of negligence, and the common carrier, railroad or transportation company issuing any such receipt or bill of lading, shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company aforesaid, through whose negligence the loss, damage or injury may be sustained. No contract, receipt, rule or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier, which would exist, had no contract been made or entered into."

There is a class of cases which holds that such a provision as that under consideration, while generally valid in those states not having a statute or statutes prohibiting the limitation of the common law liability, is of no avail as against a statute which prohibits any limitation of the common law liability.

In 6 Cyc., pp. 505-6, it is said: "It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of or damage to the goods shall be given to the agents of the carrier within some specified time, such as thirty or ninety days, and that, unless such notice is given, there will be no liability on the part of the carrier, and such stipulations are generally upheld, so far as they are found to be reasonable. Cases holding such stipulations to be invalid are usually based on the ground that the terms thereof are



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unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore as ineffectual against a claim for loss or injury due to the carrier's negligence, and also as invalid where limitation of common law liability is prohibited by statute." Cases are cited from several states in support of the text.

On the other hand, Hutchinson on Carriers (3rd ed.) sec. 442, says: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination or within a certain time thereafter, or within a designated time after the loss has occurred; and when such conditions are reasonable, the owner will be precluded from the right to maintain an action against the carrier unless he has presented the notice within the time stated and in the manner provided. The object of conditions of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make it difficult, if not impossible, for him to ascertain their truth. It is just, therefore, that the owner, when a loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim according to the reasonable conditions of the contract."

A great number of cases hold that a provision identical in terms, or in some cases less favorable to the shipper, than the one under consideration, is reasonable, and should be enforced—among them *Simons v. Great Western Ry.*, 86 E. C. L. 804, where it was held by the court of common pleas that a condition

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in a bill of lading was just and reasonable, which provided that "no claim for damages will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered;" and *Lewis v. R. Co.*, 5 Hurlstone & Norman's Rep. 867, where a stipulation was held to be reasonable to the effect that "No claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered."

*Express Company v. Harris*, 51 Ind. 127; *Capehart v. S. & R. R. Co.*, 77 N. C. 355; and *Texas Cent. R. Co. v. Morris*, 16 A. & E. Ry. Cas. 259, are to the same effect.

In *Black v. Wabash R. Co.* 111 Ill. 351, 53 Am. St. Rep. 628 a bill of lading requiring notice of claim in writing within five days, was held valid, the court saying: "The manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment while the facts, and circumstances upon which they are based, are fresh in the memories of parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants." See also *Sprague v. M. P. R. Co.*, 34 Kan. 347, 8 Pac. 465.

In *Pavitt v. L. V. R. Co.*, 153 Pa. 302, 25 Atl. 1107, the court sustained as valid a stipulation in a bill of lading for the transportation of horses, providing that the shipper must make claim in writing within five days from date of unloading, the court saying: "It is settled from all the authorities that such a provision as this, inserted in a contract by a common carrier, is reasonable and will be enforced. It is proper, because the demand promptly made gives warning and enables the carrier, while evidence is attainable and recollection clear, to institute inquiry into the merits of the claim, and thus guard against fraud or over-valuation." See also *Armstrong v. Chicago, M. & St. P. Ry. Co.*, 53 Minn. 183, 54 N. W. 1059; *Selby v. Rail-*

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road, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; *C. C. U. & St. L. Ry. Co. v. Newlin*, 74 Ill. App. 638; *American Grocery Co. v. Staten Island R. T. Co.*, 51 N. Y. Sup. 307; *St. Louis & San Francisco R. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215.

Let us consider for a moment the authorities bearing upon the effect of the statute heretofore quoted upon this provision.

In *Gulf & Santa Fe R. Co. v. Traawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 A. & E. R. Cas. 49, treating of the effect of a statute of the state of Texas upon such a stipulation, it is said: "The statutes of this state only forbidding such contracts as would limit or restrict the common law liability of carriers, we see no reason why contracts executed upon sufficient consideration and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts."

In *Goggin v. Kansas Pac. Ry. Co.*, 12 Kan. 416, Chief Justice Kingman said: "It is undoubtedly settled that the common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract; but it seems that he cannot relieve himself from liability for his own negligence. The contract pleaded does not pretend to relieve the defendant from the consequences of his own negligence. It only stipulates that the shipper shall, on his part, perform certain duties."

See also *Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. St. Rep. 385; and *Sprague v. M. P. R. Co.*, *supra*, where the court said: "The stipulation requiring notice of any claim for damages to be given, cannot be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the ad-

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justment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

On this point, see also *Paritt v. L. V. R. Co.*, *supra*; *Case v. C. C. C. & St. L. Ry. Co.*, 11 Ind. App. 517, 39 N. E. 426; *B. & O. S. W. Ry. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

The Supreme Court of the United States, in *Southern Ex. Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 566, treats of this subject as follows: "The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made this claim, he may delay his suit.

"It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law, and inoperative. \* \* \* A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just as applied to the present case. \* \* \* If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have, in fact, been properly delivered. With the bailor, the bailment is a single

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transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons, such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers."

We are of opinion that there was no error in the instruction complained of, that it is decisive of this controversy, and that the judgment should be affirmed.

*Affirmed.*

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Syllabus.

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**Staunton.****MORGAN v. HALEY.**

September 12, 1907.

1. **JUDGMENTS—Collateral Attack—Partition—Equity Jurisdiction.**—While a suit for partition under section 2562 of the Code cannot be made a substitute for an action of ejectment, still a court of equity has jurisdiction to partition land under some circumstances, although the defendant claims title to the whole tract, when he or those under whom he claims title was a joint owner with the complainant or those under whom he claims title. If such jurisdiction is upheld by the court in the partition suit, its decree, even if erroneous, cannot be collaterally assailed in another suit.
2. **BREACH OF WARRANTY—Eviction—Actual or Constructive.**—In order to maintain an action for the breach of a covenant of warranty, there must have been an eviction. Generally, the eviction must have been actual, but sometimes a constructive eviction is sufficient. Constructive eviction is sufficient where the premises are in the actual possession of a third person under a paramount title at the date of the conveyance. It is also sufficient where the covenantee is compelled to purchase the paramount title, the validity of which has been established by the judgment or decree of a court of competent jurisdiction and ordered to be sold at public auction.
3. **COVENANTS OF WARRANTY—Breach—Notice of Suit—Request to Defend.**—In order that the proceedings in a suit against a covenantee to recover the land by paramount title may be conclusive on the covenantor, when sued upon his covenant of warranty, it is necessary not only that distinct and unequivocal notice be given to the covenantor of the pendency of the suit to recover the land, but he must also be requested to appear and defend it.
4. **COVENANTS OF WARRANTY—Breach—Measure of Damages—Counsel Fees.**—In an action by a covenantee to recover damages for a breach of a covenant of warranty of land, which he has lost by title paramount, the measure of the plaintiff's damages is the price paid for the land, with the interest from the date of eviction, and the legal and taxable costs expended by him in the action in which he was evicted. Fees paid to counsel for defending the title are not recoverable.

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Error to a judgment of the Circuit Court of Lee county, in an action of covenant. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Pennington Brothers*, for the plaintiff in error.

*Orr & Noel* and *Duncan & Cridlin*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

John D. Morgan, the plaintiff in error, sold and conveyed a tract of land to Sanders Spurlock, with covenants of general warranty; and Spurlock sold and conveyed the same to Frances Haley, the defendant in error, who instituted this, her action of covenant against Morgan to recover damages for the loss of a portion of the land by title paramount, as alleged in her declaration.

The first error assigned in the petition, and which raised the question as to the proper method of declaring on a lost deed, was waived in oral argument.

The second assignment of error is to the action of the court in admitting in evidence a copy of a deed, because it was not properly certified by the clerk of the court, in whose office it was recorded.

The copy was attested as follows: "A copy, Teste: H. C. T. Ewing, Clerk."

If the certificate had stated that the person making it was clerk of the court, in whose office the deed was recorded, or had used initials to show that fact, under the decisions of *Gibson v. Com'th*, 2 Va. Cases 111, 120, *Wynn v. Harman*, 5 Gratt. 157, 165-6, and *Usher v. Pride*, 15 Gratt. 190, 195-6, it would clearly have been *prima facie* sufficient. But whether in its pres-

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ent form it was admissible in evidence, it is unnecessary to decide, as the judgment complained of will have to be reversed on other grounds, and the case remanded for a new trial when this question is not likely to arise again, as the defect in the certificate, if it be one, can easily be cured.

The trial court permitted the record in the chancery cause of Lula M. Postlewaite against the defendant in error to be introduced in evidence for the purpose of showing the latter's eviction from that portion of the land, for the loss of which she seeks to recover damages in this case. That action of the court is assigned as error, upon the ground, first, that the court which tried that cause was without jurisdiction; and, second, that the record does not show such eviction.

The ground relied on to show that the court was without jurisdiction to hear and determine that cause (which was a suit for partition), is, that the defendant in error, who was the defendant in that suit, claimed title to the whole tract of land sought to be partitioned, not as joint owner with the plaintiff in that suit, but by an independent adversary title.

It is quite true, as argued, that a suit for partition, under the provisions of section 2562 of the Code, cannot be made a substitute for an action of ejectment (*Pillow v. Southwest &c. Imp. Co.*, 92 Va. 144, 148, 23 S. E. 32, 53 Am. St. Rep. 804), but it is equally true that a court of equity has jurisdiction to partition land under some circumstances, although the defendant claims title to the whole tract where he (or those under whom he claims title) was a joint owner with the complainant or those under whom he claims title. See *Pillow v. Southwest &c. Imp. Co.*, *supra*.

Whether or not such facts and circumstances were alleged and proved in the partition suit of *Postlewaite v. Haley* as gave the court the right to try the question of title in that suit under section 2562 of the Code, was a question to be decided in that cause. The court which heard and decided it had the power to determine whether or not the case made by the bill was within



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the jurisdiction of a court of equity; and having proceeded in the case to a final decree, must, of necessity, have determined that question in favor of its right to exercise the jurisdiction invoked. It may have erred in its decision, but such error would not make its action void. The decree would only be erroneous at most, but conclusive until reversed or vacated. In this case, neither the circuit court nor this court could determine whether or not that case was one of equitable jurisdiction without an inquiry into the facts, and where inquiry is necessary, the decree, however erroneous, is not void, and cannot, therefore, be collaterally assailed. *Lemmon v. Herbert*, 92 Va. 653, 655-658, 24 S. E. 249, and authorities cited.

The other ground of objection to the introduction of that record in evidence is, that it did not show the eviction of the defendant in error from the land to which the court held that the complainant in that cause had the paramount title.

It appears from the record in that cause that the court decreed that the complainant had a paramount title to an undivided sixth interest in the land sought to be partitioned; that it was impracticable to partition the land in kind and lay off that interest; that the same was directed to be sold; that it was sold by a special commissioner to the defendant in error at public auction; and that the sale was reported to the court and confirmed. While there was no actual eviction of the defendant in error, she was compelled, under the decree of the court, to purchase that interest or surrender the possession thereof to such other person as might become the purchaser.

It is always necessary, in order to maintain an action for the breach of covenant of warranty, that there shall be an eviction, and generally there must be an actual eviction; but sometimes a constructive eviction is sufficient. One class of cases where constructive eviction is sufficient, is where the premises are in the actual possession of a third party under a paramount title at the date of the conveyance. In such a case the covenantee can maintain his action, although he has never been in

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possession of and actually evicted from the land. *Sheffy v. Gardner*, 79 Va. 313, and authorities cited.

Another class of cases, under "the head of constructive eviction," says Rawle on Covenants for Title (5th ed.), sec. 142, "is that which holds that an eviction will be caused by the covenantee having compulsorily purchased or taken a lease under the paramount title, without any actual change of possession, both in cases where the validity of such title has been established by judgment or decree of a court of competent jurisdiction, and under certain circumstances where it has not been established."

While the cases are not in accord on this question, the weight of modern authority and the better reason is in favor of the rule, as stated by Rawle, at least to the extent that a covenantee may maintain an action for breach of covenant of warranty where he has been compelled to purchase the paramount title when the validity of such title has been established by the judgment or decree of a court of competent jurisdiction and ordered to be sold at public auction; for, in such a case, the covenantee has the right to presume that, if he does not become the purchaser, he will be evicted by or for the benefit of the person who does purchase at such sale. *Whitney v. Densmore*, 6 Cush. 124; Rawle on Cov. for Title, sec. 143; 11 Cyc. 1128, 1129; 8 Am. & Eng. Ency. L. (2nd. ed.), 108; *Hoffner's Heirs v. Burchett*, 11 Leigh 93, 88-9.

The next assignment of error is to the action of the court in instructing the jury as to the character of the notice required to be given to the covenantor when suit is brought against his covenantee to recover the land, in order that the proceedings in that suit shall be conclusive upon the covenantor when sued upon his covenant of warranty.

The trial court was of opinion, and so instructed the jury, that notice given to the plaintiff in error by the defendant in error, her agent or attorney, of the pendency of the suit and of the claim asserted therein in time to defend the same, was

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sufficient to render the proceedings in that case conclusive upon the plaintiff in error.

The question involved in this assignment of error has not been passed upon by this court in any reported case. In some jurisdictions it is held that, where suit is brought on a paramount claim against one who is entitled to the benefit of any of the covenants for title, and especially it would seem, of the covenant of warranty, he can, by giving proper notice of the action to the party bound by the covenants and requesting him to defend it, relieve himself from the burden of being compelled afterwards to prove in an action on the covenants the validity of the title of the adverse claimant. In other jurisdictions, in order to relieve himself of that burden, it is only necessary for the party sued to give proper notice of the pendency of such action without calling upon the party bound to defend the suit.

Mr. Rawle, in his work on Covenants for Title (5th ed.), sections 117 to 125, upon a review of the cases, reaches the conclusion that the weight of authority is in favor of the view that there must not only be a distinct and unequivocal notice of the suit given to the party bound by the covenants, but he must also be requested to appear and defend it. And this would seem to be the better doctrine upon reason as well as upon authority. No one, it would seem, on familiar principles, ought to be bound by a proceeding to which he is not a party actually or constructively. The covenantor is not actually a party. If, upon mere notice of the suit, he would be authorized to come in and assume the conduct of the defense, so far as proof of his own title was concerned, there might be, as was said in *Brown v. Taylor*, 13 Vt. 631, "some reason for holding him bound by such knowledge. But without the assent of the defendant in the suit, he has no such authority. It is *res inter alios acta*, and if he should apply to the court for permission to defend, the defendant not having voluntarily offered it, the answer would be that he had no occasion to do so, since his rights could not be affected by the judgment." If he appears and is per-

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mitted to make defense, he is, of course, bound by the proceedings, or if properly notified and requested by the defendant to make defense and he fails to do so, there is no hardship in holding him bound by the proceedings in the suit. He had notice and the right to appear and defend his title, and if he did not do so, it was manifestly his own fault. 7 Rob. Pr. 150-151.

The action of the court in holding that the defendant in error had the right to recover as part of her damages the fee (\$50) she paid her attorneys in the partition suit, is assigned as error.

Neither has this question been passed upon by this court so far as the reported cases show. In other jurisdictions the decisions of the courts are not in accord. In some it is held that counsel fees cannot be recovered as part of the damages for breach of covenant of warranty; in others, that they may, provided the covenantor has been required to defend and has failed to do so; and in still others, that they are recoverable wherever the covenantor does not employ counsel to defend, the fact of notice or want of notice to defend being immaterial. Rawle on Cov. for Title, secs. 197 to 200, and cases cited.

Since the decision in the case of *Threlkeld v. Fitzhugh*, 2 Leigh 489, the settled doctrine in this State has been, that the purchaser of land, upon eviction, is only entitled to the purchase price paid, with interest from the date of eviction and the costs expended by him in the action in which he was evicted. *Click v. Green*, 77 Va. 827, 835; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646. The term "costs" has a well-defined legal meaning, and means those expenses incurred by parties in prosecuting or defending a suit, action or other proceeding at law or in equity, recognized and allowed by law, and taxed against the losing party. 5 Ency. Pl. & Pr. 106, and cases cited.

The law, as a general rule, measures the expenses incurred in the management of a suit by the taxable costs. The taxable costs are the costs contemplated by those decisions, as we under-

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stand them, and not the other expenses incurred in defending the action in which the covenantee was evicted, however great they may have been. There would seem to be no more reason for allowing expenses incurred in the employment of counsel as a part of the covenantee's damages for breach of covenant of warranty than expenses incurred in visiting and conferring with counsel, finding and interviewing witnesses, and in performing all the other duties necessary in preparing the case for trial.

In the case of *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. 56, it was held, that in an action on an injunction bond with condition "to pay all such costs as may be awarded against the plaintiff and all such damages as shall be incurred in case said injunction be dissolved," fees paid to counsel in the injunction suit could not be recovered as damages, although the bill was a pure bill of injunction. One of the reasons given for refusing to allow the fee as damages in that case was, (quoting from the Supreme Court of the United States in the case of *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43,) that "There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy, on the part of the court, to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

That reasoning applies with equal force against the allowance of attorneys' fees in this case. We are of opinion that

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the sound, simple and more satisfactory rule is to deny the right to recover counsel fees as part of the damages, and to confine the right of recovery to the fees allowed by statute and taxed in the costs of the action in which the covenantee is evicted.

It follows, from what has been said, that the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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Statement.

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**Staunton.****NORFOLK & WESTERN RAILWAY COMPANY v. BELCHER'S ADMINISTRATRIX.**

September 12, 1907.

1. RAILROADS—*Negligence—Employees on Yard—Signals—Lookout.*—A railroad company does not owe to its employees engaged on its yards, over which engines are constantly moving, the duty of sounding whistles, ringing bells or keeping a constant lookout to warn them of dangers of which they already have knowledge. Such employees are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injury from the movement of engines and cars always to be expected. Those in charge of switching engines on a yard have the right to assume that employees on the yard, who are familiar with the dangers of the place, will lookout for themselves, and will not fail to leave a place of danger in time to avoid injury. There can be no recovery by an employee on a yard who negligently steps on to a track on which a switching engine and cars are moving in his direction, and who is there injured by the cars in consequence of inattention to his surroundings.

Error to a judgment of the Circuit Court of Wise county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Ayers & Fulton, Theodore W. Reath, and C. T. Duncan, for the plaintiff in error.*

*Bond & Bruce, Bullitt & Kelly, and Irvine & Morison, for the defendant in error.*

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HARRISON, J., delivered the opinion of the court.

This action was brought by the administratrix of O. E. Belcher against the Norfolk & Western Railway Company to recover damages for the alleged negligent killing of the plaintiff's intestate. The trial resulted in a verdict and judgment for \$2,000 in favor of the plaintiff, which we are asked by the defendant company to review.

The petition assigns as error the action of the circuit court in overruling the demurrer to the declaration; its action in refusing to strike out certain words in the declaration alleged to be objectionable; its action in giving and refusing certain instructions; and its action in overruling the motion of the defendant company to set the verdict aside as contrary to the law and the evidence. All of these assignments of error involve but one proposition of law, which, in our view of the case, can be best considered in connection with the facts applicable thereto.

The plaintiff's intestate was an employee of the defendant railroad company, about seventeen years of age, engaged as a section hand on the railroad yards at Norton, in Wise county. An approaching train made it necessary for the deceased and a co-laborer to leave the track upon which they were working for the train to pass. They stepped to a place of safety, clear of all tracks, but the deceased, for some unexplained reason, immediately left his position of safety, against the remonstrance of his fellow-workman, crossed the track which he had just left, in front of the approaching train, and took his stand in the center of a parallel track, with his back to an approaching switching engine, which was pushing six cars toward him, and within sixty feet of the nearest car. The fireman on the passing local train saw the dangerous position of the deceased, and called to him, but he paid no attention, seeming to be oblivious of his peril. The engineer of the backing switching train did not see the deceased, and his brakeman did not see him until within



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fifteen feet of him, too late to save him, though he immediately notified the engineer, who stopped the train as promptly as possible.

The contention of the plaintiff is that it was the duty of those in charge of the backing switching train to keep a lookout to discover persons on the track at the place where the accident happened. In other words, the negligence of the deceased, in leaving his position of safety and putting himself in a place of danger, is, as it must be, conceded; but the doctrine of the last clear chance is invoked in order to fix liability upon the defendant. This theory of negligence on the part of the servants of the defendant, after they discovered, or by keeping a lookout might have discovered, the peril of the deceased, was maintained by the circuit court throughout its rulings on the trial. The fact is established in this case that the engineer in charge of the switching train did not see the plaintiff's intestate at all, and his brakeman did not see him until the car was within a few feet of him.

It is undoubtedly a well-settled general rule, that it is the duty of a railroad company to keep a lookout at all places where passengers and strangers are to be expected upon the track, and that it is liable for injuries which, by the use of ordinary care might have been averted, after the peril of the person injured was discovered, or by the use of ordinary care, might have been discovered. But there is no sufficient reason for enforcing this rule without limitation in a railroad yard, where all of the employees have equal knowledge of the constant shifting of cars in making up trains, and equal facilities for looking out and protecting themselves from the dangers naturally incident to such work. If those in charge of a switching train see an employee in danger, from which there is reason to believe he will not remove himself, they must do all that can be reasonably done to protect him. They cannot wilfully injure him. But they are justified in presuming that the employees on a railroad yard, who are familiar with the constant movements of

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such trains, will look out for themselves, and will not fail to leave a place of danger in time to avoid injury; and especially that they will not leave a place of safety and take one of imminent danger without the slightest attention to their surroundings. In a railroad yard there are other things to engage the attention of those in charge of a switching train besides watching the track to see if another employee is going, contrary to the dictates of prudence and reason, to get on the track and stand with his back to cars moving toward him and in sixty feet of him.

At the time of the accident, the engineer was backing the cars for the purpose of placing them upon the "house track." The brakeman had to give him a signal when that track was reached, and his attention was fixed upon the brakeman, watching for that signal. Under these circumstances, it would have been difficult for either engineer or the brakeman to have had their eyes upon the track when the deceased placed himself upon it.

In the very similar case of *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. 835, Mr. Justice Brewer, resting the opinion of the court upon the ground that, under the circumstances, there was no negligence on the part of the defendant, says: "The plaintiff was an employee, and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employee of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him, there was no obstruction, and by ordinary attention, he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge, he places himself with his face away from the

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direction from which cars were to be expected, and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employee, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard, would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees, who had, all the time, knowledge of what was to be expected. We see in the facts disclosed, no negligence on the part of the defendants, and if, by any means, negligence could be imputed to them, surely the plaintiff, by his negligent inattention, contributed directly to the injury." See also *Wabash R. Co. v. Skiles*, 64 Ohio 133, 60 N. E. 576, 83 Am. St. Rep. 739; *Pittard's Admr. v. Southern Ry. Co.* 107 Va. 1, 57 S. E. 561, 1 Va. App. 281.

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In the case last cited, Judge Keith, in discussing the correlative duties from employees to the railroad company, says: "The yard of a railroad company is the scene of ceaseless activity, the shifting of cars and the movement of engines; and in order to carry on their work and promptly to discharge their duties, there must be a careful economy of time, and as far as possible, every moment must be utilized. Under such conditions, those engaged within yard limits are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injury from the movement of engines and cars always to be expected. The sounding of whistles and ringing of bells, under such conditions, would not add to the safety of employees, but serve only to confound them by adding to the confusion.

"It is, therefore, said in section 1258 of Elliott on Railroads, that 'As to employees, the company is under no obligation to ring the bell or sound the whistle upon a switching engine, engaged in making up trains in its yard, for the purpose of notifying such employees, who are familiar with the operation of the yard.' *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. 835.

"As was said by this court in *Darracott v. C. & O. Ry. Co.*, 83 Va. 294-5, 2 S. E. 511, 5 Am. St. Rep. 566, 'There are certain correlative duties on the part of the employee to the company; one of these is to use ordinary care to avoid injuries to himself; for the company is under no greater obligation to care for his safety than he is himself, and he must inform himself, so far as he reasonably can, respecting the dangers as well as the duties incident to the service. And in general, any negligence of an employee amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company.' "

Under the facts and circumstances of this case, and in the light of the authorities cited, we are of opinion that the servants of the defendant company were not negligent in failing to keep a constant lookout, in anticipation that the deceased would

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be guilty of the reckless act which alone cost him his life. It may be added, that if those in charge of the switching train had been under obligation to keep such a lookout, and had discovered the deceased as soon as he stepped on the track, the theory that the accident might have been avoided is a matter of the merest conjecture and speculation. When the deceased left his place of safety and stepped on the track, where he met his death, he was not more than sixty feet from the nearest car of the switching train that was backing toward him. At the rate of speed the train was moving, that distance would have been covered in seven seconds. The evidence shows that the train could not be stopped in less than fifty-one feet. So that to stop the train before it struck the deceased, the engineer would have had about one second in which to discover the danger, and to determine that, contrary to the dictates of reason, the deceased was going to remain in his position of peril without making the slightest effort to protect himself.

We are of opinion that, upon the facts disclosed by the record, the defendant company was guilty of no negligence, and that the accident occurred solely from a lack of proper attention on the part of the deceased. The judgment must, therefore, be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

*Reversed.*

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Statement.

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**Staunton.**

THE UNITED STATES FIDELITY & GUARANTY CO. v. JORDAN  
AND OTHERS.

September 12, 1907.

1. COUNTY TREASURERS—*Ex Parte Settlements—Prima Facie Evidence Against Sureties.*—The settlements made by a county treasurer with the board of supervisors of a county are, as against his sureties who have only bound themselves for the faithful discharge by him of the duties of his office, not conclusive, but only *prima facie* evidence of the balance in his hands at the dates of such settlements, respectively. The sureties are not regarded as in privity with their principal so as to be conclusively bound by his acts. *Baker v. Preston*, Gilmer 228, *Overruled*.

2. EQUITY JURISDICTION—*Settlement of Accounts—Remedy at Law—County Treasurers—Defaults on Different Bonds.*—Where sundry motions for judgments are pending against a county treasurer and the sureties on different bonds covering different periods, and it is claimed that the balances shown by his settlements during his first term were mere paper balances, and that he had squandered the public funds, and had used the revenue received during a second term to pay off delinquences accruing in the first term, a surety for the second term may go into a court of equity and have the proceedings on said motions enjoined, and proper accounts settled so as to ascertain in what fiscal years the defalcations accrued and the amounts thereof, and settle and determine the rights and liabilities of the sureties and co-sureties on the several bonds. It may be that such surety might have been able to make his defense at law, but it is plain that his remedy there is far less complete and adequate than in equity.

Appeal from a decree of the Circuit Court of Pulaski county.  
Decree for the defendants. Complainant appeals.

*Reversed.*

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Statement.

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The bill in this cause alleges that H. L. Stone executed sundry different bonds as treasurer of Pulaski county, the sureties on which were not the same. The first, on June 8, 1895, to cover his term of office from July 1, 1895, to July 1, 1899. A new bond, on February 6, 1899, to cover the residue of said term. A temporary bond on June 5, 1899 to cover another term, to which he had been elected, from July 1, 1899, to July 1, 1903, and, finally, on July 5, 1899, the bond on which appellant become surety, which was given in lieu of the bond last mentioned. The bill charges that, from the very first, Stone squandered and misappropriated the public revenue, using it to pay his personal debts as a merchant, for the purpose of speculation and for other improper purposes, and that, while his settlements during his first term showed large balances in his hands as treasurer, he did not, in fact, have the amount of those balances on hand, but had wasted and squandered the money, and that the balances were mere paper balances, with no actual funds to meet them; that appellant was induced to become surety by misrepresentations of Stone and others, and as soon as it became surety, Stone diverted and misappropriated the revenue derived from the fiscal year, beginning July 1, 1899, towards the liquidation of his arrearages for the previous years, so as to shift the burden of those arrearages from the shoulders of former sureties on to appellant. The bill enumerates the amounts and dates of some of the misappropriations thus made. It is then charged that Stone, realizing that he would be removed from his office, by reason of his defalcations, tendered his resignation as treasurer, which was accepted October 2, 1900, and that O. E. Jordan was appointed his successor; and that Stone was directed to settle his accounts with the board of supervisors, but had failed to do so.

The bill then charges the pendency of five different motions in the Circuit Court of Pulaski county, brought by O. E. Jordan, treasurer of Pulaski county, against Stone and his sureties on his different bonds, claiming upwards of \$50,000. In three

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of these motions, appellant is made a defendant along with the sureties on the bond dated June 5, 1899.

The bill then proceeds as follows:

"All of the said deficits, for which notice has been given, as aforesaid, of motions for judgments against your orator, were created by said H. L. Stone as treasurer, and he and other sureties of his became liable therefor, before your orator became his surety, and your orator is in no wise responsible or liable for the same. Your orator only became and is responsible for the faithful discharge by said Stone of his duties as treasurer of Pulaski county, from July 5th, 1899, to October 2nd, 1900, when his resignation was accepted by said county court; and if the revenues of the fiscal years of 1899-1900 and 1901 are faithfully applied to the liabilities of those years, your orator will not be found liable for any amount whatever.

"Your orator is advised and avers that its defense to said motions is inadequate and incomplete at law, and that it is entitled to come into a court of equity for relief in the premises. The said Stone, treasurer, has intermingled separate and distinct funds, and used portions of all funds that came into his custody after your orator became his surety to pay his derelictions before your orator became his surety, and has kept loose and unsatisfactory books of account, and a settlement of his affairs as late treasurer of Pulaski county involves a very complicated account, which necessitates a reference of the matter to a master commissioner. The rights and liabilities of different sets of sureties are involved, and questions of contribution between the sureties are raised. A resort to equity is necessary to compel the settlement of Stone as treasurer of Pulaski county, which was ordered by the county court of said county upon the acceptance by it of his resignation, and which is required by law. The said Stone, treasurer, has been very lax in making settlements required by law, and other officers have not been as punctilious in the performances of their duties pertaining to the office of treasurer as they might have been. During the



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whole time he was treasurer, the said Stone failed to make the bi-monthly statements required by section 858 of the Code of Virginia of 1887, and the clerk of the county court failed to certify his failure to the grand jury as required by said section. He failed to furnish the auditor of public accounts, at the date of his annual settlements with the auditor, a statement, showing the receipts and disbursements of the county for the preceding year, as required by the act of the General Assembly of Virginia, approved March 3rd, 1898, and found in the acts of said Assembly, 1897-98, on page 940. The said county court and board of supervisors never exercised their authority under section 861 of said Code of 1887, to require him to furnish an account of the receipts and expenditures of the county, and a statement of his accounts as treasurer thereof.

"The county court, as a rule, never ordered a commissioner to examine and report upon his official bond as required by section 855 of the said Code of 1887. He frequently failed to settle with the board of supervisors at its annual July meeting, or within sixty days thereafter, as required by law. In 1899 he did not make any settlement with them until November 3, 1899. Your orator is advised that it is not bound by said settlement of November 3, 1899, nor by any of his settlements after it became his surety, but is entitled to impeach them, and show that they are incorrect. His settlements with the board of supervisors and the county school board, and all of his other settlements after your orator became his surety, showing balances in his hands, are incorrect in this, that he did not have those balances in his hands, and the deficits occurred before your orator became his surety, and his sureties at the time said deficits occurred are liable for same, and not your orator. Your orator is ready and willing to pay for any deficits for which it is justly liable, but for no others. Your orator is advised and avers that said H. J. Stone is the owner of both real and personal estate in the said county of Pulaski, and that your orator is entitled to resort to a court of equity to compel an

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exhaustion of said Stone's own property towards the payment of his official defalcations before your orator can be required to pay any portion of the same.

"Your orator is also advised that, in view of all the premises, a resort to equity by it will prevent a multiplicity of suits.

"Being remediless in the premises, save in a court of equity, where matters of this sort are properly cognizable, your orator prays that O. E. Jordan, as treasurer of Pulaski county, and H. L. Stone, in his individual capacity, and as late treasurer of Pulaski county, and \* \* \* (sureties on the several bonds above mentioned), be made parties defendant to this bill, and required to answer the same, but answer on oath is waived as to each and all of them; that your honor will enjoin the said O. E. Jordan, treasurer of Pulaski county, from proceeding with the said motions of which notice has been given as aforesaid, or any of them; that your honor will compel said H. L. Stone, late treasurer of Pulaski county, to settle his accounts as of the date of the acceptance of his resignation; that your honor will enquire and ascertain in what fiscal years the said Stone, treasurer, etc., was guilty of defalcations, and the amounts thereof, and determine and adjudicate what set, or sets, of his sureties are liable for the same, and decree all proper contribution between sets of sureties and between co-sureties, and first subject the estate, real and personal, of said H. L. Stone toward the payment of his defalcations as treasurer, and to these ends order all necessary and proper accounts to be taken and reported; that your honor will grant unto your orator all such further and general relief as is suitable to the nature of the case and agreeable to equity and good conscience; that spa. in chancery may issue, etc., and your orator, as in duty bound, will ever pray, etc."

*T. L. Massie*, for the appellant.

*Jno. S. Draper, S. W. Williams, D. S. Pollock, and Selden Longley*, for the appellees.

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BUCHANAN, J., delivered the opinion of the court.

H. L. Stone was treasurer of Pulaski county from the year 1890 until the year 1900, during which time he executed six bonds with different sets of sureties. The last of these bonds was executed July 5, 1899, with the appellant as his surety, for the remainder of the term, commencing July 1, of that year, in lieu of a bond executed on the 5th day of June, 1899.

By section 862 of the Code of 1887 it is provided that the treasurer shall receive the county levy in the manner required for the receipt of state revenues, and shall, at the July meeting of the board of supervisors, or as soon thereafter as may be, settle with the board his accounts for that year.

Stone made settlements each year he was treasurer, until November 3, 1899, when he made his last settlement with the supervisors. For the year beginning July 1, 1899, and ending June 30, 1900, and from July 1, 1900, until October of that year, when he resigned, being a defaulter, no settlement was made by him with the supervisors. These various settlements showed balances in his hands, due the county on account of roads, schools and county levies. According to the settlement of November 3, 1899, there was a large balance due on these several accounts.

To recover the moneys due the county from Stone when he resigned as treasurer, the appellee, Jordan, who succeeded him in office, was proceeding by notices and motions when the appellant instituted this suit, in which Jordan was enjoined from prosecuting the said motions. Upon a hearing of the cause, the circuit court held that the settlement of November 3, 1899, showed the amount due from Stone to the county, and in his hands as treasurer as of that date, and that such settlement was conclusive upon the appellant, his surety, at the time that settlement was made, and so decreed. That action of the court is assigned as error.

It is conceded that the settlement was *prima facie* evidence

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against the appellant; and it is further conceded, as we understand the argument of the appellant's counsel, that the ruling complained of is in accord with the decision of the special court of appeals in *Baker v. Preston*, reported in Gilmer, p. 228. But it is insisted that that decision was wrong in principle, and has been repeatedly discredited, and in fact, overruled, by this court.

That case has been criticised by members of this court, but it has never been directly overruled, and the circuit court, no doubt, as is argued, felt that it was its duty to follow it.

In that case, which was a motion by the treasurer of the state against a former treasurer, who had defaulted, and the sureties on his bond, it was held that the books kept by the treasurer were conclusive evidence of the balance actually in the treasury at any time, both against the treasurer and his sureties, so as to charge them with balances carried forward from year to year, as if those balances were actually in hand. The conclusion in that case was based upon the assumption that a judgment against the principal concludes his sureties, and, for that reason, the evidence on which such judgment was rendered ought also to conclude them.

In the case of *Munford v. Overseers of Poor*, 2 Rand. 313, Judge Green said, that the question, how far sureties are bound by a judgment or other evidence against their principal which estops or concludes him, had never, so far as he was informed, been settled in this court, except in the case of *Baker v. Preston* and his sureties, and that neither of the cases relied on in that case, to show that a judgment against the principal was conclusive upon his sureties, sustains that conclusion.

In the case of *Jacobs v. Hill*, 2 Leigh 393, it was held that a judgment confessed by the sheriff, with the assent of his deputy, against the sheriff for the deputy's default, but without the knowledge of the latter's sureties, was ample evidence of the fact of the deputy's default, and charged his sureties unless disproved by them. That decision was understood by Judge

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Tucker as holding that the judgment was only *prima facie* correct, and not conclusive against the sureties (*Henrico Justices v. Turner*, 6 Leigh 116); but Judge Moncure, in *Crawford &c. v. Turk*, 24 Gratt. 172, 184, in construing what was decided in *Jacobs v. Hill*, said: "The proceeding was upon the official bond of a deputy sheriff, which was, to some extent, an indemnifying bond, and somewhat, though not precisely, like the bond in this case. It was not necessary to decide, and was not decided, in that case, that the judgment against the sheriff was not conclusive against the sureties of the deputy; but it was sufficient to decide, as it was decided, that said judgment was *prima facie* evidence against them. The remark of Judge Carr, in delivering the opinion of the court, that, 'this, we think, was ample evidence of the fact and charged his sureties, unless disproved by them,' was extra-judicial as to the concluding words 'unless disproved by them,' and seems, in that respect, to have been made without adverting to the distinction noticed by Judge Green as before mentioned," (in the case of *Munford v. Overseers &c.*, *supra*.)

In the case of *Henrico Justices v. Turner*, *supra*, it was held that a verdict and judgment against an executor or administrator were not conclusive evidence against his surety. President Tucker, who dissented in part in that case, said, in discussing the decision in *Baker v. Preston*, that it turned upon the conclusiveness of the books of the treasurer, and not upon any previous verdict or judgment against the principal, though Judge Roane relied on the two cases just cited (*Braxton v. Winslow*, 1 Wash. 31, and *Greensides v. Benson*, 3 Atk. 248) to sustain his opinion. "That opinion," he continues, "has not been very acceptable to the profession. It was most ably combatted at the time by one of the most distinguished judges of the general court, then sitting as a member of the special court of appeals, which decided the cause." Judge Tucker's conclusion was, that it was doubtful whether the decision in *Baker v. Preston* could be sustained upon any ground.

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We have been cited to no other decision of this court, nor have we found one in our investigation which refers to *Baker v. Preston*.

In *Cox v. Thomas*, 9 Gratt. 312, 323, *Board of Supervisors v. Dunn*, 27 Gratt. 608, and *Carr v. Meade*, 77 Va. 142, records showing the liability of the principal to which the sureties were not parties, were held to be *prima facie* evidence against the sureties.

In the case of *Crawford v. Turk*, 24 Gratt. 176, which was an action by a sheriff against his deputy and the latter's sureties for his default, a judgment rendered against the sheriff in an action for the deputy's default, at the trial of which the deputy was present and took part in the defense, was held conclusive not only against the deputy, but his sureties, who had no notice of the proceeding in which the judgment was rendered. But the bond in that case provided, not only that the deputy should faithfully discharge the duties of his office, but should also indemnify and save harmless the sheriff and all other persons from all loss and damage arising from his conduct as deputy; and upon this latter provision or condition, the conclusion reached in that case was largely, if not entirely, based.

A settlement made under the provisions of section 862 of the Code of 1887, ascertaining what balances due the county are in the hands of the treasurer at the date of the settlement, may be of equal, but is of no higher, dignity than a judgment rendered against the treasurer in a proceeding against him for the same indebtedness. The general rule is that judgments bind conclusively parties and privies, because privies, whether in blood, in estate, or in law, claim under the person against whom the judgment is so rendered, and as they claim his rights, they are, of course, bound as he is. But, as a general rule, a judgment is not conclusive upon other persons, because it would be unjust to bind one by a proceeding in which he had no opportunity to make defense, and in which he could not appeal if dissatisfied with the judgment rendered therein. See *Munford v. Overseers*

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*McC. of Nottoway Co.*, 2 Rand. 313, 318; *Stinchcomb v. Marsh*, 15 Gratt. 202, 204; *Downer v. Morrison*, 2 Gratt, 250; Note 2 Smith's Lead. Cas. (5th ed.), 683.

The true view of the law would seem to be, and the older decisions so hold, that sureties are not regarded in any sense as in privity with their principal, (*Munford v. Overseers &c.*, *supra*. 2 Smith's Lead. Cas., 685; 7 Rob. Pr. 142, &c.); but in the later cases (our own as well as those of other jurisdictions) it is held that an engagement by one man to be responsible for another, creates such privity between them as to render a recovery against the latter *prima facie* evidence against the former. 2 Smith's Lead. Cas. 685 and cases cited; *Cox v. Thomas*, *supra*; *Board of Sup. v. Dunn*, *supra*; *Carr v. Meade*, *supra*.

While the general rule is as stated, that none are conclusively bound by a judgment except those who were parties or standing in privity with those who were, there are exceptions to the rule as well settled as the rule itself. *Baylor v. DeJarnette*, 13 Gratt. 152, 164.

Among the well-settled exceptions to the general rule, in which parties are conclusively bound by judgments in proceedings to which they are not parties, are cases of contracts of indemnity, or in the nature of contracts of indemnity, or in those cases in which a person, although not in form a party to the suit, is bound to assist in the prosecution or defense, and either does so in fact, or, when called upon to prosecute or defend, as the case may be, fails to do so. See *Munford v. Overseers &c.*, *supra*; *Crawford v. Turk*, *supra*; 2 Smith's Lead. Cas., 685-6; 7 Rob. Pr. 150-2; *Morgan v. Haley*, *ante*, p. 331.

None of the bonds executed by Stone were bonds of indemnity, nor in the nature of contracts of indemnity. The condition in each was, that he should faithfully discharge the duties of his office or trust. We are of opinion, therefore, that the settlements made by Stone, treasurer, with the board of supervisors were not conclusive, but only *prima facie* evidence of the

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balance in his hands at the date of said settlements respectively.

Having reached the conclusion that the settlements made by Stone, treasurer, under the provisions of section 862 of the Code, were only *prima facie* evidence against the sureties on his bonds at the date of such settlements, respectively, we are of opinion that the appellant, under the allegations of its bill, had the right to have the proceedings at law enjoined, in order that it might make its defense in a court of equity.

It may be that the appellant might have been able to make its defense at law, but it seems plain that its remedy there would have been far less adequate and complete than in equity, where all necessary accounts could be taken and the rights of all concerned ascertained and determined in a single suit. See *National L. Ass. v. Hopkins*, 97 Va. 167, 171, 33 S. E. 539; *Va. Min. Co. v. Wilkinson*, 92 Va. 98, 100, 22 S. E. 839.

Most of the questions raised in this case were not passed upon by the circuit court, because, in the view it took of the conclusiveness of the treasurer's settlements as to his sureties, it was unnecessary to do so. This court having reached a different conclusion as to the effect of his settlements, those questions become material; and as the oral and the written arguments here were, for the most part, devoted to the discussion of the effect of said settlements, and but comparatively little attention paid to the other questions, this court is of opinion that it would be better for all parties in interest for it not to pass upon any of the questions involved in this appeal, except the effect of such settlements and the jurisdiction of the court, but to leave all other questions open and remand the cause to the circuit court for further proceedings, where all the other questions, most of which depend largely upon matters of fact, can be carefully considered after full argument, and where, if error has been or be committed, there will be a better opportunity to have it corrected than there is in this court, whose decisions are final unless the error is discovered within the time allowed for a rehearing.



Opinion.

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We are of opinion, therefore, to reverse the decree appealed from and remand the cause for further proceedings, to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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Statement.

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**Staunton.**

**VIRGINIA AND SOUTHWESTERN RAILWAY COMPANY v. HOLLINGSWORTH.**

September 12, 1907.

**1. VENUE—Corporation Defendant—Plea to Jurisdiction—Better Writ.—**

In an action of tort against a railroad company, a plea to the jurisdiction is good which avers that the cause of action did not nor did any part thereof arise in the county in which the action is brought, and that, at the time of the issuing of the writ in the cause, the defendant did not have its principal office in said county, and that it had no president or other chief officer residing in said county, and which further states in what county the cause of action, if any, did arise, and in what city its principal office was at the time of issuing the writ and still is. The venue of all actions in this State, whether local or transitory, is fixed by statute, and the statute declares where actions against corporations as well as individuals may be brought.

**2. DEMURRER—Voluntary Statement of Grounds—Other Grounds—Code,**

1904, section 3271.—Under the provisions of section 3271 of the Code (1904), where a plaintiff voluntarily states in writing the grounds of his demurrer to a plea in abatement, no other grounds can be considered than those so stated. The fact that the grounds were stated voluntarily, and were not required by the court, is immaterial. The statute applies as well in one case as the other.

Error to a judgment of the Circuit Court of Scott county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The defendant, though a corporation, seems to have appeared in proper person.

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The plea to the jurisdiction in this case was in the following words:

"And the said defendant comes and says that this court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because the defendant says that the supposed cause of the said action did not, nor did any part thereof, arise in the said Scott county, but that the supposed cause of said action, and every part thereof, did arise, if at all, within the county of Washington, and that, at the time of the issuing of the said writ in this case the said defendant did not have its principal office in said county of Scott, and that it had no president or other chief officer residing in said county of Scott, and that its principal office then was, and has ever since been, in the city of Bristol in the state of Virginia.

"And this the defendant is ready to verify.

"Wherefore it prays judgment whether this court can or will take any further cognizance of the action aforesaid."

.. The demurrer was in the following words:

"The plaintiff comes and says that the said plea to the jurisdiction is not sufficient in law, and for grounds for said demurrer says that this action is a transitory one and can be brought anywhere in the state the defendant may be found."

*Bullitt & Kelly* and *D. D. Hull*, for the plaintiff in error.

*Duncan, Matthew & Maynor*, and *Richmond & Bond*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Maggie Hollingsworth filed her declaration in an action of trespass on the case in the Circuit Court of Scott county against the Virginia and Southwestern Railway Company, from which it appears that the defendant is a corporation, organized and doing business under the laws of the state of Virginia. At the

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same rules to which the suit was brought, the defendant filed a plea to the jurisdiction, which states that the Circuit Court of Scott county "ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because the defendant says that the supposed cause of the said action did not, nor did any part thereof, arise in the said Scott county, but that the supposed cause of said action, and every part thereof, did arise, if at all, within the county of Washington, and that, at the time of the issuing of the said writ in this case, the said defendant did not have its principal office in said county of Scott, and that it had no president or other chief officer residing in said county of Scott, and that its principal office then was, and has ever since been, in the city of Bristol, in the state of Virginia;" and concludes with a verification.

The plaintiff demurred to this plea, and said "that the said plea to the jurisdiction is not sufficient in law, and for grounds for said demurrer, says that this action is a transitory one, and can be brought anywhere in the state the defendant may be found."

The circuit court, being of opinion that the cause of action sued upon is a transitory one, and that the defendant might be sued wherever found, sustained the demurrer and rejected the plea; and thereupon the defendant pleaded the general issue, and, upon a trial before a jury, there was a verdict for the defendant. This verdict was, upon motion of the plaintiff, set aside, and at a subsequent trial, there was a verdict and judgment for the plaintiff; and the case is before us upon a writ of error awarded the defendant.

So much of section 3214 of the Code of 1904 as is pertinent to this case declares, that "Any action at law or suit in equity except where it is otherwise especially provided, may be brought in any county or corporation—

*First.* Wherein any of the defendants may reside.

*Second.* If a corporation be a defendant, wherein its princi-

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pal office is, or wherein its mayor, rector, president, or other chief officer resides."

Section 3215 provides, that "An action may be brought in any county or corporation wherein the cause of action, or any part thereof arose, although none of the defendants reside therein." But the effect of this latter section is qualified by section 3220, which declares that process against a defendant to answer in any action brought under section 3215, "shall not be directed to an officer of any other county or corporation than that wherein the action is brought, unless it be an action against a railroad, express, canal, navigation, turnpike, telegraph, or telephone company."

The plea in abatement to the jurisdiction in this case avers, "that the supposed cause of the said action did not, nor did any part thereof, arise in the said Scott county, but that the supposed cause of said action, and every part thereof, did arise, if at all, within the county of Washington." It avers that the defendant did not have its principal office in said county of Scott, and that it had no president or other chief officer residing in said county, and that its principal office then was and ever since has been, in the city of Bristol, in the state of Virginia. The plea is a complete negation of the jurisdiction of the circuit court of the county of Scott, with respect to the residence of the defendant, as provided in the first sub-division of section 3214, and it is equally as complete with respect to the second sub-division, which refers especially to corporations, for it appears that it had no president or other chief officer residing in Scott county, and that its principal office then was and ever since has been in the city of Bristol, Virginia. The denial of jurisdiction under section 3215 is equally complete, for it avers that the supposed cause of action did not arise in Scott county, but that it, and every part thereof, arose, if at all, within the county of Washington. There is no room for dispute that the plea denies the existence of every fact upon which the jurisdiction of the county of Scott could be asserted. It gives to the plaintiff a

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better writ with respect to the cause of action, which is averred to have arisen, if at all, within the county of Washington; it gives to the plaintiff a better writ with respect to the location of the principal office of the defendant company, which is averred to be in the city of Bristol, in the state of Virginia.

It is contended, however, upon the part of the defendant in error, that the plea is insufficient, in that, while it denies that the company had a president or other chief officer residing in the county of Scott, it does not show the place of residence of the president or other chief officer, and, in that respect, fails to give to the plaintiff a better writ. In reply to this contention, it is pointed out by plaintiff in error that the terms of the rule upon this subject, with respect to a plea in abatement is, that the plea must give the plaintiff a better writ; that the plea does give the plaintiff a better writ—indeed, two better writs; and that, therefore, the letter of the rule invoked has been complied with; while defendant in error insists that the plea must inform the plaintiff with respect to every court within whose jurisdiction his suit might have been properly brought.

Conceding, for the sake of argument, that such is the law, it would avail the defendant in error nothing in this case. In section 3271 of the Code it is provided, that "The form of demurrer or joinder in demurrer may be as follows: 'The defendant says that the declaration is not sufficient in law;' provided that all demurrers shall be in writing, except in criminal cases, and in civil cases the court, on motion of any party thereto, shall, or of its own motion may, require the grounds of demurrer relied on to be stated specifically in the demurrer; and no grounds shall be considered other than those so stated, but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial."

The plaintiff, as we have seen, filed her demurrer in writing, in which she says that "the said plea to the jurisdiction is not sufficient in law, and for grounds for said demurrer says that this action is a transitory one, and can be brought anywhere in

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the state the defendant may be found." The only ground here stated—the only ground which the circuit court was called upon to consider, and as appears from its order, the only ground which it, in point of fact, considered—is that the cause of action being a transitory one, could be brought anywhere in the state where the defendant could be found. That ground having been stated and relied upon, the statute expressly declares that none other shall be considered.

To meet this contention, the defendant in error insists that she was not required by the court to state her grounds of demurrer, but that she did so voluntarily, and that, therefore, the statute does not apply; but to this contention we are unable to give our sanction. By coming forward and stating in writing her grounds of demurrer, the court and the opposite party were disarmed. It would have been a superfluous and idle thing to require the plaintiff to do that which she had already done of her own accord, and counsel and the opposing party could safely rely upon the written statement of the plaintiff as constituting the sole ground of demurrer with respect to the defendant's plea in abatement.

Defendant in error relies upon sections 7424, 7425, of Thompson's Commentaries on the Law of Corporations, from which it appears that, in some of the states a corporation is held to reside wherever it exercises its franchise; and upon section 7426, from which it appears that in some of the states a corporation, for the purposes of jurisdiction, is deemed to reside throughout the entire limits of the state, and especially in those counties where it carries on its business and exercises its franchises, and is hence suable in any county where it has an agent, upon whom process against it may lawfully be served. "But," says the author, "it should be carefully kept in mind that this rule is not so much a theory of the courts as to the legal *situs* of a corporation for the purposes of jurisdiction, as it is a rule in particular states, founded on the express language of *statutes*; and that, in so far as the states have the same rule,

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it is rather a rule depending upon a concurrence of judicial decisions."

Section 7427 of the same work says: "In the absence of special statutory provisions relating to the venue of civil actions by and against corporations, it is a sound conclusion that the same rules prevail which have been established by general statutes—in other words, that the same rules prevail in the case of corporations as in the case of natural persons. It has been so held in respect of actions by corporations. So, a constitutional provision requiring all civil cases to be tried in the county in which the defendant resides, is held to apply to corporations as well as to natural persons."

Section 7428 states the law very nearly in accordance with our statute. "Another rule, founded entirely, it may be assumed, on constitutional and statutory provisions, is to the effect that, a corporation being a resident of the state for jurisdictional purposes, an action against it may be brought in the county where the injury, which is the special matter of the action, was done, or where the contract, which is the subject of the action, was broken; or (at the pleasure of the plaintiff) in the county where the chief office or place of business of the corporation is situated."

Barton's Law Practice (2nd ed.) Vol. 1, sec. 9, states the general rule to be that transitory actions "may be brought against a party wherever he may be found and served with process no matter where he may reside, or where the cause of action arose. The statute declaratory of the jurisdiction, territorially, of the courts, provides that actions or suits, unless it be otherwise specially provided, shall be brought in any county or corporation wherein any of the defendants may reside; against a corporation wherein its principal office is, or chief officer resides; if upon a policy of insurance, wherein the property insured was situated, or the person whose life was insured resided at the date of the policy of insurance; if to recover land, or subject it to a debt, or be against a defendant



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who resides without, but has estate or debts due him within this state, or be against a foreign corporation, in the county or corporation wherein such land, estate, or debts, or any part thereof, may be. \* \* \* An action may also be brought in any county or corporation wherein the cause of action, or any part thereof, may arise, although none of the defendants reside therein. But this last provision is subject to the qualification contained in section 3220 of the Code, that process issued against a defendant under section 3215, unless the defendant be a railroad, express, canal, navigation, turnpike, telegraph, or telephone company, and in certain other cases, to answer in any action, shall not be directed to an officer of any county or corporation other than that wherein the action is brought." Further on in this same section the author remarks, that "by reading sections 3214, 3215 and 3220 together, we find that an action may be maintained against a railroad, canal, turnpike, express, navigation, telephone or telegraph company, in any county or corporation in which the cause of action, or any part thereof, arose, whether said corporation was incorporated by the laws of this state or any other state or country, provided it is transacting business in this state."

In section 84, speaking of "Direction and Service of the Writ," the learned author says: "Where the defendant resides or happens to be in the same county or city where the cause of action arose, there is no difficulty about the writ, nor is there any trouble in suing a defendant in a transitory action wherever he resides. Confusion has arisen, however, where suits have been brought in a county or city where the cause of action did not arise or the defendant reside, but where he happened to be at the time of the service of the writ. In such a case, the action may be defeated by a plea in abatement. But, even if the suit be instituted in the county or city where the cause of action arose, the writ cannot, except in the cases hereafter mentioned, be sent to another county or city to be served. If it be so sent the action may be defeated without plea in abatement,

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for the service of such a writ is simply void, and an appearance to contest it will not be regarded as an appearance on the merits, or as a waiver of the question of jurisdiction."

We have no decision upon our statutes affecting this subject as they now stand in the Code, and we have therefore gone more fully into the subject than might otherwise have been necessary.

We are of opinion that the circuit court erred in sustaining the demurrer to the plea, and that for this error its judgment should be reversed, the plea to the jurisdiction sustained, and the suit of the plaintiff in the circuit court of Scott county dismissed.

*Reversed.*

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Statement.

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**Staunton.**

VIRGINIA POCAHONTAS COAL CO. v. LAMBERT.

September 12, 1907.

1. PRINCIPAL AND AGENT—*Ratification—Agent Acting for Himself.*—Where a stranger holds himself out as the agent of another and makes a contract or does an act for that other's use or benefit, the latter may ratify. But, although a stranger may falsely represent himself as the agent of another, yet if he makes a purchase in his own name, for his own benefit and pays his own money therefor, there can be no ratification. Nor can the supposed principal, as against the alleged agent, claim the benefit of the purchase unless it was made under such circumstances as creates an estoppel, or the supposed principal has been deprived of some legal right, or been otherwise injured.
2. TRUSTS AND TRUSTEES—*Constructive Trust—Misrepresentations—Conveyance to Cure Defect in Former Deed.*—One who falsely represents himself as the agent of another, and procures a conveyance of land in his own name, by causing his vendor to believe that the conveyance is made to cure defects in a former conveyance of the vendor to such other, is a mere trustee for the party really intended to be benefited by the grantor.

Appeal from a decree of the Circuit Court of Roanoke county.  
Decree for the defendant. Complainant appeals.

*Reversed.*

The opinion states the case.

A. A. Phlegar, for the appellant.

Robertson, Hall & Woods, for the appellee.

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BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by the appellant for the purpose of compelling the appellee to convey to it the interests which he had acquired in two parcels of land lying in McDowell county, in the state of West Virginia, one containing ninety-three and the other thirty-four acres, by a conveyance from Susan J. Beavers and John Cline and wife, upon the ground that appellee had obtained said conveyance by falsely representing himself as the agent of the appellant.

The record shows that Samuel Lambert died in the year 1851, seized of several parcels of land, and leaving seven children. In the partition of his real estate, the ninety-three and thirty-four acre parcels involved in this suit were allotted to the decedent's daughters, Susan J. Beavers and Martha J. Cline, and his son, Thomas A. Lambert. The latter conveyed his interest to Bartley Rose, from whom, by *mesne* conveyances, the same passed to the appellant. In the year 1869 the interest of John Cline in these lands, by virtue of his rights as the husband of Martha J. Cline, was sold in a creditor's suit to Peter Cline. Afterwards Cline and wife, as they testify, executed a deed for her interest in the land to Alexander Beavers and Bartley Rose, who had acquired the interest sold in the creditor's suit; but this deed was not recorded and has never been found. The interest of Alexander Beavers and Bartley Rose passed by *mesne* conveyances to and is now owned by the appellant. In the year 1867 Susan J. Beavers and her husband, Andrew J. Beavers, undertook to convey their interest in the lands to Alexander Beavers, but the acknowledgment of the wife being insufficient, as is claimed, her interest did not pass by the deed.

By deeds dated, respectively, February 3, 1902, and March 13, 1902, a tract of 1,969 acres, and by a deed dated October 1, of the same year, a tract of a little over 200 acres, were conveyed to the appellant. These parcels of land adjoined each other and embraced the 93 and the 34-acre parcels of land in-

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volved in this suit; but it appears that the appellant did not know that they were so embraced until in March, 1903, and was not informed as to the sources of title to the 93 and 34-acre parcels until August of that year, as the appellant's agents, in examining the title to the 1,969 and the 208-acre parcels, seem to have overlooked the interest of Mr. Cline and the defect, or alleged defect, in the deed by which Mrs. Beavers attempted to convey her interest.

By deed dated September 29, 1902, Mrs. Cline and her husband and Mrs. Beavers conveyed to the appellee all their interest in the lands of Samuel Lambert, deceased, consisting of the 93 and the 34-acre parcels and another small tract of land, which latter is not embraced in this litigation. In May, 1903, the appellee gave the appellant a twenty-days' option to purchase these lands at the price of \$200 per acre, and after the option had expired, the appellant sought, without success, to have the same extended. In August of that year, the general counsel of the appellant interviewed Mrs. Beavers and Cline and wife, who informed him of their interest in and dealings with the land, and the circumstances under which they had conveyed to the appellee.

The question involved in the first error assigned, is whether or not the conveyance made by Cline and wife and Mrs. Beavers was obtained under such circumstances as entitles the appellant to the benefit of the interests thus acquired by the appellee.

The appellant bases its contention that they were so acquired upon two grounds—First: That the appellee made the purchase as the avowed agent of the appellant; and, Second: That he became a trustee *ex maleficio* because of the misrepresentations made to his grantors.

As to the first ground: The evidence satisfactorily shows that the appellee, in obtaining the conveyance of their interests from Mrs. Beavers and Cline and wife, represented that he was the agent of the appellant. This statement was false, and the

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purchase was made in the appellee's own name, for his own benefit, and the consideration was paid with his own money.

It is settled law that where a stranger holds himself out as the agent of another and makes a contract, or does an act, for that other's use, or for his benefit, the latter may ratify. But it is equally clear, we think, that, where the contract made, or the act done, was not in that other's name, and was not intended for his use or benefit, there can be no ratification. This would seem to be necessarily so from the meaning of the word "ratify."

"Ratification," says Bouvier in his Law Dictionary, "is an agreement to adopt an act performed by another for us."

"A ratification," says a recent text-book, "by a principal of the acts of an agent can only be effectual between the parties when the act was done by the agent on account of the principal, not on his own account or on account of a third person. Where one buys in his own name for himself, another cannot adopt the act as a principal." 1 Am. & Eng. Ency. L. (2nd ed.) 1188-9. It is said in a note to that work, where numerous authorities are cited, that the rule as stated in the text is that laid down in the Year Book, 7 Hen. IV., fol. 35, where it was held that if a bailiff take a heriot, claiming property in it himself, the subsequent assent of the lord would not amount to a ratification; but if he take it as bailiff of the lord, the subsequent assent amounts to a ratification of the bailiff's act.

In the case of *Forbes &c. v. Hagman, &c.*, 75 Va. 168, 178, Judge Burks, who delivered the opinion of the court, in discussing the question of ratification, after stating what had been done in that case (tort), says: "This was a virtual ratification and adoption of what had been done by the agent, on the principle *omnis ratihabitio retrahitur et mandato priori aequiparatur*, which applies as well to a tort, when done to the use or for the benefit of him who subsequently adopts it, as to a matter of contract. It was said by Lord Coke, that 'he that agreeth to a trespass after it is done is no trespasser, *unless* the trespass was done *to his use* or *for his benefit*, and then his

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agreement subsequent amounteth to a commandment.' 4 Inst. 317. So that the test of liability in such a case is said to be the consideration whether the act was originally intended to be done *to the use* or *for the benefit* of the party who is afterwards said to have ratified it. Broom's Leg. Max. 873 (marg.)"

"Chief Justice Tindall," continues Judge Burks, "in *Wilson v. Tumman*, 5 Man. & Gr. (46 Eng. C. L. R.) 236, states the rule more fully thus: 'That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law.'"

In the case of *Garvey v. Jervis*, 46 N. Y. 310, 313, 7 Am. Rep. 335, Chief Judge Church, in discussing this question, said: "It is a familiar rule that the ratification of an unauthorized act of an agent is equal to an original authority (Dunlop's Paley's Agency, 171, note a). But in this case the essential element is wanting, that the act must be done *for another*. Here it was not so done. The most that can be claimed is, that the defendant said he was acting for the plaintiff, which was false. He paid his own money, and in fact acted for himself. He was a stranger to the plaintiff, and, of course, under no obligation to act for him, and, as we have seen, he deprived the plaintiff of nothing to which he was entitled. \* \* \* No authority has been cited, and I think it is safe to say that none exists, in which any court has ever held that a false declaration of agency for another enables the latter, as against the alleged agent, to receive the benefit of an act actually performed for the latter, unless it was performed under such circumstances as to create an estoppel, or unless the assumed principal has been deprived of some legal right, or otherwise injured." See also *Phil. W. & B. R. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128, 130.

It is clear, as it seems to us, under the authorities and upon principle, that the appellant is not entitled to the benefit of the

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conveyance to the appellee upon the ground that it had the right to and did ratify the purchase of the land acquired by him.

This brings us to the consideration of the question whether the purchase was made under such circumstances as to constitute the appellee a trustee *ex maleficio* for the benefit of the appellant.

While the evidence is conflicting as to the representations made by the appellee in obtaining the conveyance from Mrs. Beavers and Cline and wife, it clearly appears from the whole testimony and from the circumstances surrounding the transaction, that he made the impression upon the grantors that he was not purchasing for himself, but for the coal company, which claimed to be the owner of the land and was in possession thereof, and that they were induced to make the conveyance because of their belief that in so conveying they were curing defects in former conveyances of the same land made by them. In other words, the record establishes the fact that the appellee secured the conveyance by causing his vendors to believe that it was made to cure defects in their former conveyances. Where a conveyance is procured under these circumstances, the grantee under settled equitable principles is held to be a mere trustee for the party really intended to be benefited by the grantor.

"In general," says Pomeroy on Eq. Jur., sec. 1053, "when- ever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein. \* \* \*"

Perry on Trusts, sec. 118, says, that "If a person, by his



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promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him."

In 15 Am. & Eng. Ency. L., (2nd ed.) p. 1188, it is said: "So also, if one, though not in fact the agent of another, pretends to act as his agent and thereby secures title in his own name to property in which such other has an interest, he cannot deny that he was acting as agent and claim the benefit of the purchase, but will hold the title so acquired in trust."

In the case of *Rollins v. Mitchell*, 52 Minn. 41, 38 Am. St. Rep. 519, it was held, Mitchell, J., delivering the opinion of the court, that one who obtains a conveyance of land from a former owner by fraudulently giving him to understand that it is for the purpose of supporting an earlier defective conveyance, and thus validating the title of one who claimed thereunder, is a trustee *ex maleficio* for the latter, and that, in such case, the rights of the *cestui que trust* do not depend upon the existence of a fiduciary relation in regard to the title between him and the fraudulent grantee, nor upon the fact that he has some legal claim to the land which he could have enforced against the original owner thereof.

In the case of *Harold v. Bacon*, 36 Mich. 1, it was held that a deed fraudulently obtained from one who had before conveyed to another by a deed not of record, by false representations that it was being procured by and for the protection of the party holding under such prior unrecorded deed, did not vest in the grantee any title as against the real party for whose benefit the grantor undertook and designed to make the grant; and that such fraudulent grantee was a mere trustee for the party really intended by the grantor to be benefited.

We are of opinion that the appellee holds the property or interests acquired from Mrs. Beavers and Cline and wife in

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trust for the benefit of the appellant, and that the circuit court erred in not so decreeing.

The decree complained of must, therefore, be reversed, and the cause remanded to the circuit court for further proceedings in accordance with the views expressed in this opinion.

*Reversed.*

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Statement.

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**Staunton.**

## WISE TERMINAL CO v. McCORMICK.

September 12, 1907.

1. PLEADING—*Amended Declaration—New Case—Case at Bar.*—If an amended declaration asserts rights or claims arising out of the same transaction, act, agreement, or obligation as that upon which the original declaration is founded, it will not be regarded as for a new cause of action, however great may be the difference in the form of liability asserted in the two declarations. In the case at bar, the cause and form of action are the same in both declarations, and the amended declaration merely charges the negligence complained of in varying form to meet the different phases of the evidence.
2. EVIDENCE—*Opinion Evidence—Experts.*—Subject to proper restrictions based on their experience and knowledge, witnesses may give their opinion as to the distance within which a locomotive engine may be stopped.
3. EVIDENCE—*Testimony at Former Trial—Non-Availability of Witnesses.*—In order that proof may be admitted of what a witness stated at a previous trial between the same parties and upon the same issue, sufficient reason must be shown why the original witness is not produced, as that he is dead or out of the State, or that diligent enquiry for him where it is most likely that he would be found has proved unavailing, or that the opposite party has caused his absence, and the evidence on this subject should be complete and satisfactory. In the case at bar, the evidence on the subject of the non-availability of the witness falls short of these requirements.

Error to a judgment of the circuit court of Wise county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

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Opinion.

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The opinion states the case.

*Ayers & Fulton*, and *Bullitt & Kelly*, for the plaintiff in error.

*Wm. H. Werth*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The evidence in this case, which is before us the second time, was exhaustively reviewed on the former hearing, and held not to establish actionable negligence on the part of the plaintiff in error, the Wise Terminal Company. *Wise Terminal Co. v. McCormick*, 104 Va. 400, 51 S. E. 731. It is now alleged that the second recovery is founded on substantially the same evidence, and must, therefore, be controlled by the former decision. On the other hand, the defendant in error contends that the evidence at the second trial, set out in the stenographic report, is not sufficiently identified to constitute part of the record, and the original record was brought up on a *subpoena duces tecum* to substantiate that assertion.

As a new trial must be granted on another ground, it is unnecessary to pass upon that question; but before dismissing the subject, the objections to inadequate certification of evidence with which we are repeatedly confronted, justify our again calling the attention of the profession to the importance of paying more regard to this essential feature in making up a record. *Jeremy Improvement Co. v. Com'th*, 106 Va. 482, 56 S. E. 224.

The first assignment of error which claims our attention is to the action of the trial court in rejecting the plea of the act of limitations. The assignment proceeds upon the theory that the amended declaration makes a new case.

In this the plaintiff in error is mistaken, as an inspection of the pleading plainly shows. The cause and form of action

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are the same in both declarations, and the amended declaration merely charges the negligence complained of in varying form to meet different phases of the evidence.

The principle is clearly stated in *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300, as follows: "If an amended declaration assert rights or claims arising out of the same transaction, act, agreement or obligation as that upon which the original declaration is founded, it will not be regarded as a new cause of action, however great may be the difference in the form of liability asserted in the two declarations."

That the case falls within the rule thus laid down will be seen from the statement in the petition for a writ of error, that "The evidence on the last trial was confined mainly to the issue presented by the amended declaration, but the same issue was raised by the former declaration, and substantially the same evidence was introduced and \* \* \* held insufficient to support a verdict."

Several assignments involve objections to the admission of opinions of witnesses with respect to the distance within which the engine could have been stopped. Subject to proper restrictions, based on the knowledge and experience of the witnesses, such evidence is admissible, and is usually relied on to prove that fact.

The next assignment is founded on the alleged effort of the plaintiff to discredit one of his own witnesses; but the record does not sustain the objection. The purpose of the examination which is made the ground of exception was to refresh the memory of the witness by reference to his testimony at the former trial, and not to impeach him.

Another error assigned is to the action of the court in allowing the testimony of the witness Campbell on the former trial to be read to the jury. The rule of practice, which, in civil actions at least, under certain circumstances, permits proof of what a witness stated at a previous trial between the same parties and upon the same issues, is conceded.

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In 16 Cyc. 1088, the rule is stated thus: "The court must be satisfied (1) That the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) That the issue is substantially the same in the two cases; (3) That the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) That a sufficient reason is shown why the original witness is not produced. The first three of these conditions render the reported evidence relevant; the fourth is necessary to justify the court in receiving it."

In the same work, at pages 1095-6, after declaring that such testimony is substitutionary, it is said: "The court will therefore insist upon being satisfied, not only that the situation of the case promises some advantage from its use, but also that a sufficient reason be shown why the original witness is not produced; and that it is impossible, fairly speaking, for the person offering the evidence to produce the living witness or to take his deposition." In n. 24, on the *quantum* of proof necessary, it is declared, that "inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established before the testimony is admitted—as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant has caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confined largely to the discretion of the judge, and not be revisable on appeal when properly exercised." Citing *Sullivan v. State* 6 Tex. App. 319, 32 Am. St. Rep. 580.

Illustrations of what constitutes due diligence in such cases are given at page 1098, n. 32. "To ascertain by writing to the postmaster of a certain town in a distant state that a former witness is not in the postmaster's town, but in another town of the postmaster's state (the Texas case, *supra*), or to show that

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the witness is reputed to be out of the state (*Baldwin v. St. Louis &c. R. Co.*, 68 Iowa 37, 25 N. W. 918), or for an officer charged with the service of a subpoena to report that he has made diligent search for a witness at the supposed residence, and been informed by persons unknown to him that they had heard that the witness was dead (*Augusta &c. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706), have been held under the facts of these particular cases, not to be sufficient. Alleged absence from the jurisdiction must be established by the testimony of some one who knows the fact, or can testify to circumstances within his knowledge which will justify the inference of such fact. *Baldwin v. St. Louis &c. R. Co.*, 68 Iowa, 37, 25 N. W. 918; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510. Statements by persons with peculiar means of knowledge may, together with lack of further opportunity for inquiry, suffice to admit the evidence. Thus, in case of an attesting witness, the reply of his parents, that he was in America was considered by Mr. Justice Erle as 'reasonable evidence that the witness is out of the jurisdiction of the court.' *Austin v. Rumsey*, 2 C. & K. 736. The mere fact that a party who could have summoned a witness has preferred to rely on his promise to attend voluntarily, is no reason for admitting the witness's former evidence. *Provo City v. Shurtliff*, 4 Utah 15, 5 Pac. 302. The action of the court in deciding what search is sufficient will not be revised in the absence of evidence of gross abuse of discretion. *Vauban v. State*, 58 Ark. 353, 371, 24 S. W. 885; *Clinton v. Estes*, 20 Ark. 216."

In further discussion of the subject in the text, it is observed: "The more modern tendency is not only to require that the absence offered as a basis for admitting the former evidence should be permanent, but to require further that the party offering the evidence should show, to the satisfaction of the court, that he could not, by the use of reasonable diligence, have procured the deposition of the absent witness. Mere absence from the jurisdiction at the time of trial is a disability by no means

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equivalent to death, without affirmative evidence that a fruitless search has been conducted in good faith and with due diligence, and that, from ignorance of the witness' whereabouts or other reason, his deposition could not have been given."

The Virginia statute (Va. Code, 1904, sec. 3365), provides that in a civil case at law a deposition taken on proper notice may be read, if, when offered, the witness be dead, or out of the state. But it has been held that hearsay evidence, that the deponent has left the country and has not returned, is not sufficient to authorize the reading of his deposition. *Collins v. Lowry*, 2 Wash. 75, (2nd ed. 97). See also *Powell v. Manson*, 22 Gratt. 176, 187, and cases cited.

Campbell resided at Pulaski, Virginia, and the foundation laid for admitting his former testimony was the statement of the sheriff of Wise county that he sought him at Blackwood, and heard that he had left. The defendant in error also testified that, in response to his inquiries, he learned that Campbell had left Blackwood, and he believes he heard that he had gone to Knoxville. He says that at Norton a young man from Pulaski told him he did not think Campbell was at home. He likewise made inquiry of a man at Toms Creek, who said that if Campbell was at Pulaski, he did not know it, but that he had been absent from that place for several weeks, perhaps for one or two months. Witness admitted that he had neither written to Pulaski concerning Campbell's whereabouts, nor otherwise inquired for him at his home. It is true a subpoena directed to the sheriff of Wise county, was returned "not found," but, manifestly, the return of an officer of a bailiwick other than that in which the witness usually resides, affords but scant evidence of the fact that he is beyond the process of the court.

The preliminary evidence relied on in this instance is obviously insufficient to have warranted the introduction of Campbell's testimony at the first trial.

Errors are assigned to the action of the court in giving and



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refusing certain prayers, but they are dependent on evidence, and as we cannot anticipate that the precise questions involved will likely arise at the next trial, it is unnecessary to notice these exceptions.

For the error of the trial court in the particular indicated, we are of opinion to reverse the judgment complained of, to set aside the verdict of the jury, and remand the case for a new trial.

*Reversed.*

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Statement.

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**Richmond.****BROWN v. GIBSON'S EXECUTOR.**

November 21, 1907.

Absent, Cardwell, J.

1. **WILLS—Construction—Meaning of Words Used.**—Where the language of a will, taken as a whole, is clear and unambiguous, the safest mode of construction is to adhere to the words of the will. The true inquiry is, not what the testator intended to express, but what the words used do express.
2. **WILLS—Construction—Case in Judgment—Release of debt—Legatee not Indebted.**—A testatrix, by a codicil to her will, says: I direct that any note or notes, bond or bonds, or other evidences of indebtedness which may remain unpaid at the date of my death from the following named individuals, viz.: A, B, X, Y and Z, my executor shall cancel and surrender all such obligations to the obligors in full satisfaction and payment thereof. At the time of her death, the testatrix held the pecuniary obligations of all the persons named, for money loaned, except Z, her second cousin, who was the only one of them in any way related to her. At that time, Z was indebted to L for borrowed money, in the sum of \$7,000, evidenced by bonds not then due, which were never owned by the testatrix and had never been her property. Z claimed that it was the duty of the executor to purchase these bonds and cancel and surrender them to her, for in this way only could she be benefited by the will.

*Held:* Such was not the duty of the executor. The testatrix intended to forgive debts due to her at the date of her death. They might be incurred after the date of the will, but must be debts due to her and not to others. The words "cancel" and "surrender" in the connection in which they are used, would be inapplicable to debts due by Z to a third person.

Appeal from a decree of the Circuit Court of Augusta county.  
The bill in this case was filed by the executor of E. V. Gibson,

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asking a construction of her will and the aid and advice of the court in the administration of her estate. Margaret Gibson Brown was one of the defendants in the cause, and from a decree adverse to her interest she appeals.

*Affirmed.*

The opinion states the case.

*A. C. Braxton and Taylor McCoy*, for the appellant.

*Kerr & Kerr*, for the appellee.

HARRISON, J., delivered the opinion of the court.

This appeal involves an interpretation of the second clause of the codicil to the will of Miss E. V. Gibson, deceased, which reads as follows:

"And I do also hereby revoke the devises and bequests contained in the fourth clause of my said will, and desire to completely cancel and annull all the provisions of said fourth clause of my said will; and in lieu thereof, I direct that any note or notes, bond or bonds, or other evidences of indebtedness, which may remain unpaid at the date of my death, from the following named individuals, viz.: Joseph M. Hogshead, N. D. McCormick, Wm. C. McKemy, George W. Jenkins, John A. Frenger, George W. Dice, Fanny Dice, Wm. H. Cochran, Charles D. Whitesell, R. P. McPheeters, H. J. Williams and Margaret Gibson Brown, my executor shall cancel and surrender all such obligations to the obligors in full satisfaction and payment thereof."

This codicil, as shown on its face, was in lieu of the fourth clause of the testatrix's will, which was in these words: "I direct that all notes, bonds or other evidences of indebtedness now due to me from any source whatsoever, and which may remain unpaid at the date of my death, either as to principal or

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interest, my executor hereinafter named shall cancel and surrender to the obligors in full satisfaction and payment thereof."

It appears from the record that the testatrix, at the time of her death, held the obligations of all the persons named in the codicil, except the appellant, Margaret Gibson Brown, who was in no way indebted to her; and that all of such persons, except the appellant, who was a second cousin, were in no way related to the testatrix, but were merely borrowers of her money. It further appears that, at the time of the death of the testatrix, the appellant was indebted to Washington and Lee University in the principal sum of \$7,250, which was secured on her farm near Salem, Va., and had been so indebted for several years prior to that date.

The contention of the appellant is that, by the terms of the codicil in question, it is the duty of the executor, not only to cancel and surrender such obligations of the parties named therein as belonged to the testatrix, but to acquire out of the moneys of her estate all the evidences of indebtedness of all of the parties named in the codicil, whether belonging to the testatrix or anyone else, and after acquiring such obligations, to then cancel and surrender them to the obligors therein; and that it is, therefore, the duty of the executor to acquire the outstanding obligations mentioned of the appellant to Washington and Lee University, and to cancel and deliver the same to her; it being insisted that, unless the testatrix intended to make the appellant the beneficiary of her bounty, the mention of her name in the codicil was meaningless and useless.

It appears that the testatrix did not, in her lifetime, acquire or hold as part of her estate the obligations due from the appellant to Washington and Lee University. Indeed, those obligations were not then due, and are not now due, and, therefore, cannot be acquired, cancelled and surrendered by the executor to the appellant, except by and with the consent of Washington and Lee University, and of any such consent there is no intimation of record.

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The fourth clause of the will is very broad, and involved the cancellation and surrender by her executor, to the obligors therein, of all notes, bonds, or other evidences of debt, belonging to the testatrix, and remaining unpaid at the date of her death, from whosoever due. The codicil, which repealed the fourth clause, was evidently intended by the testatrix to withdraw this sweeping provision in favor of all of her debtors, and to limit such cancellation and surrender of indebtedness to those objects of her bounty specifically named in the codicil. The fourth clause of the will, in speaking of the debts to be cancelled and surrendered, uses the language, "indebtedness now due to me from any source whatsoever, and which may remain unpaid at my death." The codicil, in naming the debts to be cancelled and surrendered, omits the words "due to me," saying, "I direct that any note or notes, bond or bonds, or other evidences of indebtedness which may remain unpaid at the date of my death from the following named individuals," etc.

It is contended on behalf of the appellant that the omission from the codicil of the words "due to me," which had been used in the repealed fourth clause, shows that the testatrix intended to include in her benefaction, not merely such obligations as appellant might owe her at the time of her death, but all the indebtedness of appellant to whomsoever it might be due.

Reading the first part of the codicil alone, there might be some ground for this contention, unreasonable and unusual as it seems, but when the codicil relating to this subject is read as a whole, the ground for the contention disappears. The language of the codicil, taken as a whole, is, we think, clear and unambiguous. This being so, it is always the safest mode of construction to adhere to the words of the instrument. The true inquiry is, not what the testator intended to express, but what the words used do express. *Wooten v. Redd*, 12 Gratt. 196; *Burke v. Lee*, 76 Va. 386; *Waring v. Bosher*, 91 Va. 286, 21 S. E. 464.

By the terms of the codicil, the parties therein named are

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given specific legacies of the obligations mentioned, and not merely general legacies of such portions of the testatrix's estate as would equal the amount of such obligations; and the executor is directed "to cancel and surrender all such obligations to the obligors in full satisfaction and payment thereof." The language, "my executor shall *cancel and surrender*" such obligations to the obligors, seems clearly to show that the purpose of the testatrix was to limit the provision to such obligors of the person named as were owing to the testatrix herself at the date of her death. The word "surrender" presupposes the possession or ownership of the thing to be surrendered. The testatrix neither possessed nor owned the Washington and Lee University bonds, and it cannot be held, with any reason, that she intended, by the use of the word "surrender," to make a gift of something she had no interest in, and had no power or control over. If it were legally possible for the testatrix to devise obligations which formed no part of her estate, yet, by giving the words she has used their ordinary and common meaning, no other conclusion can be reached but that it was her intention that her executor should cancel and surrender such obligations to the parties named in the codicil as were in the possession of the testatrix at the date of her death, and constituted part of her estate. Not only does the word "surrender" imply possession, but the word "cancel" excludes the idea of payment, cancellation being the forgiving and obliteration of a debt. It not only is in no sense a payment, but it is the very thing that makes the payment unnecessary and impossible. *Smith v. Yancy*, 81 Va. 88.

It was clearly contemplated by the testatrix that, not only the appellant, but others named in the codicil, might not be in debt to her at the date of her death, for she directs her executor to cancel and surrender such obligations of the parties named as *remained unpaid at the date of her death*. She may also have anticipated that new obligations, which did not exist at the date of the will, might exist, as part of her estate, at the

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date of her death, her purpose being that, if any such new obligations of the parties named should come into existence before her death, they should be cancelled and surrendered like those already in existence were to be, if remaining unpaid. If, however, no such new obligations came into existence, the will contains no direction to her executor to create such obligations by acquisition or otherwise.

It may be, as contended, that the testatrix contemplated acquiring the Washington and Lee University bonds, and that such expectation caused her to name appellant in the codicil as one whose obligation was to be cancelled and surrendered, but the fact remains that she did not carry out any such purpose. It is not the province of the court to speculate on the intention of the testatrix in opposition to her plain and unambiguous language. Such a course would only be productive of endless uncertainty and confusion.

For these reasons, the decree of the circuit court must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

BOWLING, SPOTTS &amp; COMPANY v. DAVIDSON AND OTHERS.

November 21, 1907.

1. **TRUST DEEDS—Inconsistent Reservations—Fraud Per Se.**—A general deed to secure creditors is not fraudulent *per se*, because of the fact that the trustee is permitted to continue the business for six months and to extend the time for another six months, if it is demonstrated to be to the advantage of the creditors secured, but provides for a sale at any time, upon request of creditors holding as much as \$2,000 of the debts secured, or at any time the trustee deems it wise or is requested in writing by the grantor to sell. Whether or not a deed is fraudulent *per se* is a question to be determined by the court from an inspection of the deed.
2. **TRUST DEEDS—Inconsistent Reservations—Accelerating Date of Sale—Fraud Per Se.**—While a deed which reserves to the grantor powers inconsistent with the avowed object of the deed, is fraudulent *per se*, a provision in a deed for the benefit of creditors of a grantor which authorizes a sale of the trust subject at an earlier date than that fixed by the deed, if desired by the grantor, is not repugnant to and inconsistent with the avowed object and purpose of the deed so as to render it invalid.

Appeal from a decree of the Circuit Court of Bath county.  
Decree for defendants. Complainants appeal.

*Affirmed.*

The opinion states the case.

*J. M. Perry*, for the appellant.

*Greenlee D. Letcher*, for the appellee.



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WHITTLE, J., delivered the opinion of the court.

This appeal is from a decree of the Circuit Court of Bath county, whereby it was adjudged that a deed of trust executed by the appellee, J. Graham Davidson, for the benefit of creditors, was not fraudulent *per se* and void.

The deed is admittedly free from the imputation of fraud in fact, and its provisions are characterized by commendable fairness to all parties concerned. It includes all the grantor's assets, and secures all his creditors ratably, and contains no clause releasing the debtor from such portions of his indebtedness as may remain undischarged by the trust fund. The administration of the trust is confided to a former clerk of the grantor, a man of exemplary character and thoroughly familiar with the business. It also appears that the grantor's mother, his largest creditor, has agreed to surrender all benefit under the deed to such of the creditors as may accept its terms. The fairness of the arrangement is, moreover, attested by the circumstance that, out of fifty odd creditors secured by the deed, the appellant alone challenges the correctness of the decree. The intention and acts of the grantor give a deed its character, and it is apparent that it was the purpose of the appellee, who was engaged in the mercantile business and failed, to avoid bankruptcy by making a full and fair surrender of all his assets for the benefit of creditors.

Though it is true, that whether or not a deed is fraudulent as a matter of law (that is to say, whether it contains some stipulation irreconcilable with an honest purpose), is a question to be determined by the court from an inspection of the instrument itself, it is but just to the grantor that the foregoing statement of undisputed facts be made matter of record.

The deed empowers the trustee, should he deem it to the interest of the creditors, to continue the business for six months from its date, "and if, at the end of that time, the indebtedness is not paid, and it is demonstrated that a continuance of the

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operation of the business will be to the advantage of the creditors, the said trustee may continue to operate the business for six months longer; but at any time he shall be requested in writing by any two or more of the creditors, holding in the aggregate over \$2,000 of the debt, the said trustee shall forthwith proceed to close up the business with the most practicable dispatch, and at any time that the trustee deems it wise, or is requested so to do in writing by J. Graham Davidson, he will proceed to close up the business, \* \* \* selling the remainder of the property, \* \* \* as authorized in this deed. After the expiration of twelve months after the date hereof, the trustee may, if he deem it best for the creditors, continue the business for twelve months longer, or less, if requested in writing by J. Graham Davidson and creditors holding a majority in amount of the debts secured by this deed."

There is striking similarity between this instrument and the deed, the validity of which was sustained in *Hurst v. Leckie*, 97 Va. 550, 34 S. E. 464, 75 Am. St. Rep. 798. But it is contended that the differentiating features of the two deeds, and the vitiating feature of this deed, are to be found in the stipulation contained in the latter, reserving to the grantor power at any time to require the trustee to foreclose.

The law has been settled in this state, from the time of the decision in *Lang v. Lee*, 3 Rand. 410, that a deed which "reserves to the grantor power inconsistent with the avowed object for which the deed is made," is *per se* fraudulent. This principle, in varying form, has repeatedly received the sanction of this court; but no case has been cited, and we know of none, where a deed has been condemned as fraudulent which reserves to the grantor the power to require the trustee, at any time, to foreclose the deed. Surely, a reservation, the exercise of which must result in an immediate sale of the trust subject and application of the avails to the payment of debts, cannot be declared inconsistent with the objects of an assignment for the benefit of creditors, or be construed, in any just sense, as amenable to

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objection on the ground that it may be used to hinder or delay creditors.

This precise question has been decided adversely to the view of the appellant in *Sipe v. Earman*, 26 Gratt. 563, and therefore, a review of analogous cases would be unprofitable. The court, in that case, at page 569, observes: "Nor is the provision, which authorizes an earlier sale, if desired by the grantor, repugnant to and incompatible with the avowed object and purposes of the deed, so as to render it invalid and void."

For these reasons, we are of opinion that the decree of the circuit court is without error, and ought to be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## CLINCHFIELD COAL CO. v. POWERS.

November 21, 1907.

1. **SPECIFIC PERFORMANCE**—*When it will be Decreed.*—All applications for the specific performance of contracts are addressed to the sound judicial discretion of the court, regulated by established principles, and, to warrant enforcement, the contract must be clearly ascertained and distinctly proved, and must be reasonable, certain, legal and mutual, and founded on a valuable, or at least meritorious consideration; and the complainant must not have been backward, but ready, desirous, prompt and eager.
2. **SPECIFIC PERFORMANCE**—*Meeting of Minds on Subject and Terms of Contract.*—Where the court is unable from all the circumstances of the case, to say whether the minds of the parties met upon all the essential particulars of a contract, or, if they did, then cannot say exactly upon what substantial terms they agreed, or trace out any particular line where their minds met, specific performance will be refused.

Appeal from a decree of the Circuit Court of Dickenson county. Decree for complainant. Defendant appeals.

*Reversed.*

The opinion states the case.

*J. Norment Powell, Ayers & Fulton and W. H. Rouse, for the appellant.*

*A. A. Skeen, for the appellee.*

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KEITH, P., delivered the opinion of the court.

J. H. Powers filed his bill in the circuit court of Dickenson county, asking a specific performance of a contract alleged to have been made by him for the sale of a certain parcel of land to the Clinchfield Coal Company. The Clinchfield Coal Company filed its answer, denying the plaintiff's equity.

The facts of the case are as follows: One Owens, as agent for H. G. Morison, entered into negotiations with J. H. Powers, which resulted in a written contract, dated October 14, 1905, to the following effect: That Powers and wife, parties of the first part, bargained and sold to H. G. Morison, and covenanted to convey by deed of general warranty, and free from all encumbrances and clouds upno the title, to the party of the second part " the following tract or parcel of land situated, lying and being in the county of Dickenson, state of Virginia, on the waters of Frying Pan Creek, adjoining the lands of Clinchfield Coal Company, J. P. Sutherland, S. D. Sutherland, and others, and bounded as follows: All coal heretofore sold and conveyed are excepted from this contract, and all poplar trees branded are excepted from this contract; containing 500 acres, more or less, the acreage to be determined by actual survey, and being the same acquired by the parties of the first part by deed from Henry Sutherland.

"The terms of this sale are \$20.00 per acre for the said lands, as the acreage is determined by actual survey hereafter to be made, of which purchase price the sum of \$25.00 is paid cash in hand, the receipt of which is hereby acknowledged, and the balance is to be paid in three equal payments, the first of which is to be made as soon as the title can be examined, a survey made, and the deed herein provided for executed and delivered, and the remaining payments to be made in six and twelve months from this date.

"In further consideration of the sum of \$25, this day paid, the receipt of which is hereinbefore acknowledged, it is agreed

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that the said party of the second part shall have the right for a period of sixty days from this date, to elect whether he will purchase said land upon the terms herein stated, and that if the said party of the second part, or his assigns, does, within the said period of sixty days from this date, notify the said parties of the first part of his intention to purchase the same, then the said parties of the first part shall be bound to convey, and the said party of the second part or his assigns shall be bound to pay for and accept said land, upon the terms herein-before stated." The remainder of this contract is omitted, as not being material to the decision of the question before us.

On December 11th, and within the sixty days, the Clinchfield Coal Company, through W. H. Rouse, its attorney, sent the following notice to Powers:

"You are hereby notified that it is the intention of the Clinchfield Coal Company to take and pay for that certain tract of land lying in Dickenson county, Virginia, on the waters of Frying Pan Creek, adjoining the lands of the Clinchfield Coal Company, J. P. Sutherland, S. D. Sutherland, and others, containing 500 acres, more or less, in accordance with the terms and provisions of a contract executed by you on the 14th day of October, 1905, to H. G. Morison, and by said Morison assigned to the said company. This 11th day of December, 1905.

"CLINCHFIELD COAL CO.,

"By W. H. ROUSE, *Attorney.*"

On the 10th of July, 1906, Powers and wife tendered to the Clinchfield Coal Company a deed in execution of their contract, as understood by them, but it appearing that, by this deed, the grantors did not convey the whole of that certain tract of land lying in Dickenson county, as described in the contract, but only the western portion thereof, containing 411 acres, reserving to themselves something more than 200 acres of the tract, upon which were the improvements and level land, constituting the

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most valuable and desirable portions, the Clinchfield Coal Company refused to accept the deed; and thereupon this suit was instituted.

Owens, who conducted the negotiations with Powers, was in no sense a general agent, either of Morison or of the Clinchfield Coal Company. His authority was limited to procuring an option upon certain property. The option contract of October 14, 1905, is, upon its face, a covenant to convey, should its terms be thereafter accepted, a "tract or parcel of land, situate, lying and being in the county of Dickenson, state of Virginia, on the waters of Frying Pan Creek, adjoining the lands of Clinchfield Coal Company, J. P. Sutherland, S. D. Sutherland, and others, \* \* \* containing 500 acres, more or less, the acreage to be determined by actual survey, and being the same acquired by the parties of the first part by deed from Henry Sutherland." The written acceptance conformed to this offer *in ipsissimis verbis*. Owens had no authority, as agent, to bind Morison or the Clinchfield Coal Company by any verbal agreement or understanding not embodied in the paper of October 14, 1905; nor does he, in his evidence, claim that Morison or the company knew before the papers were signed that Powers did not intend to sell and convey the entire tract, except so far as that information may be inferred from his letter to Morison, to which we will presently advert.

Q. 21. "Then, in your letter to Morison you did tell him that Powers did not want to sell all of his tract of land, but would sell a part, and asked him (Morison) what you should do about taking the contract? Is this correct?"

A. "My letter to Mr. Morison, I believe, explained to him. I don't think I explained to him the part he wanted to sell, but that he would sell 500 acres, more or less. I don't think I explained to him the part that he wanted to sell or how the lines was to be run."

Morison, in his deposition, says: "I had absolutely no information from any one that the contract covered less than the

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entire boundary owned by James H. Powers." And, upon being asked, "When and how did you first hear of such a claim as is referred to in the last question?" he answered: "Some time about the first of January, 1906, while at Clintwood, Mr. L. D. R. Owens, in a conversation, gave me to understand that James H. Powers was intending to or had withheld a valuable part of his tract of land on Frying Pan, situated around his house, and taking in the forks of the creek."

The letters referred to are as follows:

"Bee, Va., October 6, 1905.

"H. G. Morison, Esq., Bristol, Va.-Tenn.:

"MY DEAR SIR,—I have been to see Mr. J. H. Powers, and have his promise for a contract for about 500 acres of his land, crossing the creek just above his house, and running to the top of the ridge on east side of Frying Pan, connecting with S. D. Sutherland tract, at the mouth of Spruce Pine Branch. He now is willing to take \$20.00 per acre. This land has very good cull poplar, and lots of nice oak. Advise me at once.

"Yours very truly,

"L. D. R. OWENS."

To this letter Morison replied October 10, 1905:

"DEAR SIR,—I beg to acknowledge receipt of your letter, advising that Mr. J. H. Powers is willing to trade his land. Please take a contract upon the five hundred acres as indicated in your letter, and then, if at all possible, obtain a contract from him upon the remainder of his land, allowing him to farm and use it during his lifetime at the best figure you can get, which I presume will be more than \$20.00 per acre. Please close this matter just as quickly as you can, and advise Mr. Rouse. I think you have done exactly right in keeping this matter so well before you."

The pleadings do not make a case for the reformation of a



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contract upon the ground of fraud, accident or mistake. There is, it is true, an allegation that, by mutual mistake, the land embraced in the option contract is described as adjoining the lands of J. P. Sutherland, when such, as it seems, is not the fact; but this is immaterial to the issue before us. The bill is filed to compel the specific performance of a contract in writing, clear and explicit in its terms, which the defendant avers in its answer, it is willing and ready to perform in accordance with its obvious meaning, but which the plaintiff asks may be interpreted by the interpolation of the verbal understanding between the complainant and the agent of the defendant, with whom he contracted, whose authority was limited to the procuring of an option, and who had no inherent power to bind his principal by any understanding, representation or agreement not embodied in the written option contract, of which verbal representations the other parties to the contract had no notice except such as might be derived from the correspondence heretofore given between Owens and Morison, which leaves the subject in the same obscurity in which it was found, for in it Morison instructs Owens to obtain an option upon the whole tract if possible, and the contract actually entered into in obedience to this letter of instruction embraces the entire tract. The law, in such a case, seems to be plain.

“All applications to the court to compel specific performances are addressed to the discretion of the court—a sound judicial discretion, regulated by the established principles of the court—and the contract must not only be distinctly proved, but it must be clearly and distinctly ascertained; it must be reasonable, certain, legal, mutual; upon valuable, or, at least, meritorious consideration, and the party seeking specific performance must not have been backward, but ready, desirous, prompt and eager.” *Dunsmore v. Lyle*, 87 Va. 393, 12 S. E. 610.

This case is well within the principle of *Blanchard v. Railroad Company*, 31 Mich. 443, 18 Am. Rep. 142, in which it is said: “Where the court is unable, from all the circumstances

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of the case, to say whether the minds of the parties met upon all the essential particulars, or if they did, they cannot say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, specific performance will be refused."

For these reasons, the decree of the circuit court must be reversed; and this court, entering such decree as the circuit court ought to have entered, dismisses the bill of complainant.

*Reversed.*

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Statement.

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**Richmond.**

CRAMER AND OTHERS V. SENGER AND TUMER.

November 21, 1907.

1. VOLUNTARY CONVEYANCES—*Deed to Wife—Consideration paid by Husband—Case in Judgment.*—The evidence in this case establishes the fact that the only consideration for the deed to a wife was a debt due by the grantor's ancestor to her husband. The deed, therefore, was, in effect, a gift of the land from her husband, and as such was voluntary and void as against his then existing creditors.
2. VOLUNTARY CONVEYANCES—*Void as to Existing Creditors of Grantor—When Debt Contracted—Case in Judgment.*—The evidence further establishes the fact that the complainant's debt was contracted long before the date of the voluntary settlement on his wife. The debt grew out of a contract made three years before the date of the deed, under which contract the husband received money from the complainants fraudulently and wrongfully, which they had the right to demand and recover of him. It is immaterial that the adjustment of the account between the parties was not made till after the date of the deed. That would not change the fact that the husband was the debtor of the complainants prior to that time. The grantor being thus indebted at the time of the voluntary conveyance to his wife, the land conveyed is liable for the debt.

Appeal from a decree of the Circuit Court of Augusta county.  
Decree for the complainants. Defendants appeal.

*Affirmed.*

The opinion states the case.

*Patrick & Gordon*, for the appellants.

*F. B. Kennedy* and *W. H. Landes*, for the appellees.

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CARDWELL, J., delivered the opinion of the court.

Emanuel Hise, on the 17th day of March, 1891, in writing under seal, agreed to give to his daughter, Lucinda Catherine Cramer, wife of Ambrose Cramer, ten acres of land, situated in the county of Augusta, adjacent to other lands owned by him, the said ten acres of land to be around about the old Shaffer mansion, and to include the mansion and out-buildings. Emanuel Hise died in 1896 without having carried out the said agreement, and in pursuance thereof, the heirs of Emanuel Hise executed another agreement, to the effect that Ambrose Cramer should take possession of certain property belonging to the estate of Emanuel Hise, which was the same property mentioned in his agreement with Catherine Cramer, upon the terms and conditions that he was to have the refusal of the premises and boundary of land at \$20.00 per acre, and if he declined to buy at that price, whenever the property was offered for sale, he should pay out of the proceeds of the sale thereof any debts which he might hold against the estate of Emanuel Hise, deceased, and any other just claims that he had paid for the estate, and also the cost of any improvements he might have made upon the property before the date of sale, such claims to be liens upon the property until satisfied.

Upon the reading of both of the above mentioned agreements together, it is clear that the last-named was but an attempt by the heirs at law of Emanuel Hise to establish a lien in favor of Ambrose Cramer for whatever amount might be due to him from Hise's estate, in the event the ten acres, including the mansion house and outbuildings, was not conveyed to Catherine Cramer as was contemplated by the first-named agreement. The agreement between the heirs of Emanuel Hise and Ambrose Cramer has no date other than the ..... day of ..... 1896, but, by an addendum on the margin thereof, signed by "A. Cramer, administrator," bearing date August 5, 1896, it

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is clear that the agreement of the heirs must have been executed prior to this last-named date.

On the 26th day of September, 1896, Senger & Tumer made a contract with Ambrose Cramer for the purchase of certain timber, the contract being made by Cramer as agent for the Shenandoah Land and Anthracite Coal Company. This contract ran from its date down to November 5, 1900, when, upon an account stated between the parties thereto, Cramer was found to be indebted to Senger & Tumer in the sum of \$450.18, it having turned out that Cramer was not, in fact, at any time the agent of the Shenandoah L. & A. C. Co. for the sale of the timber upon its lands. Thereupon, Senger & Tumer brought their action at law upon the account stated between them and Cramer in the circuit court of Augusta county, and recovered a judgment for the principal sum of \$250, with interest thereon from May 21, 1902, and costs.

In the meantime, to-wit: on the 25th day of February, 1899, the widow and heirs of Emanuel Hise, other than Catherine Cramer, by deed duly executed, acknowledged and recorded, conveyed the ten acres of land before mentioned to Catherine Cramer, for and in consideration of the sum of \$200, to be paid in the following manner, viz: "The said party of the second part (Catherine Cramer) holding claims which are to be properly authenticated against the estate of Emanuel Hise, deceased, is to have credit on the purchase money in part payment of said claims at the date of these presents, in accordance with articles of agreement made and entered into heretofore by the parties of the first part" (the widow and heirs of Emanuel Hise, deceased, other than Catherine Cramer.)

Senger & Tumer having, as stated, obtained judgment against Ambrose Cramer, in October, 1902, filed their bill in equity in the circuit court of Augusta county to subject to the lien of said judgment the tract of ten acres of land which had been conveyed as stated on the 25th day of February, 1899, by the heirs of Emanuel Hise, deceased, to Catherine Cramer, on the

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ground that said conveyance was made to hinder, delay and defraud the complainants and other creditors of Ambrose Cramer. In other words, the bill charged that, if any consideration whatever was paid for the conveyance of the said land to Catherine Cramer, it was paid by her husband, Ambrose Cramer, and that Catherine Cramer should be considered as holding the land in trust for the use and benefit of Ambrose Cramer, etc.

Upon the hearing of this cause upon the bill, the joint and several answers of Ambrose Cramer and Catherine Cramer, two reports of the commissioner to whom the cause had been referred to take and state certain accounts, and the depositions of witnesses taken on behalf of both the complainants and the defendants returned with the reports of the commissioner, the circuit court, overruling all exceptions to the said reports, in effect decreed in accordance with the prayer of complainants' bill, that the conveyance of the ten acres of land by the heirs of Emanuel Hise to Catherine Cramer was fraudulent and void as to the debts reported in the cause against Ambrose Cramer, and further decreed that, unless the said debts were, within sixty days, paid by Cramer and wife, or some one for them, certain commissioners, appointed for that purpose, should proceed to make sale of the real estate mentioned and described in the bill and proceedings in the cause, etc. From that decree, Ambrose Cramer and Catherine Cramer, his wife, obtained this appeal.

The two questions requiring determination are, (1) Was the consideration for the conveyance of the land in controversy in this cause to Catherine Cramer paid by or with the means of Ambrose Cramer; and (2) Was the debt due from Ambrose Cramer to appellees, Senger & Tumer, on which the judgment sought to be enforced against said real estate was obtained, contracted at the date of said conveyance to Catherine Cramer?

As reported by Commissioner Holt, the evidence shows that Emanuel Hise was indebted to Ambrose Cramer, certainly to the extent of \$183.56, at the time that Hise made the agreement

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to convey the ten acres of land in question to Catherine Cramer, March 17, 1891, while the agreement to convey the land in controversy, executed by the heirs of Emanuel Hise to Ambrose Cramer, made in 1896, sets forth that he should be entitled to buy the same at \$20.00 per acre, or be paid out of the proceeds of the sale thereof any debts that he might hold against the estate of Hise, deceased. This agreement was witnessed by Ambrose Cramer himself, and to it is attached this memorandum: "It is further agreed between the heirs of Emanuel Hise and A. Cramer, that he is to pay rent on said Hise in merchandise to the amount of interest that will accumulate on my account up to day and date above stated, supposed to be about \$12.00 against rent August 5, 1896. A. Cramer, Admr."

It thus appears that A. Cramer had actual knowledge of this agreement to convey, and that it was an agreement to convey to himself, and not to his wife, while the conveyance from the heirs of Emanuel Hise of February 25, 1899, of the property was to Catherine Cramer; and this deed recites that it is "in accordance with articles of agreement made and entered into heretofore by the parties of the first part." It is also clear from the evidence, that this deed was made in accordance with the original contract made between the heirs of Emanuel Hise and A. Cramer, and that Hise was not indebted to his daughter, Catherine Cramer, at any time; while the only inference which can be drawn from the facts proven in the case, is, that Emanuel Hise was indebted to A. Cramer, and that the heirs of Hise agreed, in consideration of the cancellation of this indebtedness, to convey to him this land which belonged to their father; and that, when the parties in interest came to execute the deed, it was executed at A. Cramer's request, not to himself, but to his wife.

From this state of facts, no other conclusion could have been reached than was reached by the commissioner and the circuit court, that the consideration for the conveyance to Catherine Cramer moved from A. Cramer and not from herself; in other

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words, that the land having been conveyed to Catherine Cramer at the request of her husband, A. Cramer, it was nothing more than a gift from him and void as to his creditors.

But, say appellants, at the time of the said conveyance, Ambrose Cramer was indebted to his wife to the amount of \$500, evidenced by a bond for that amount executed to J. G. Fellers by A. Cramer, secured by a deed of trust, and assigned by Fellers to Catherine Cramer, and since A. Cramer was indebted to his wife on this bond, he directed that the deed to the ten acres of land be made to his wife, and she, in consideration therefor, was to credit on the Fellers bond the value of the land thus conveyed to her.

The answer to this contention is, that there is nothing in the record to sustain it. The assignment of the Fellers bond to Catherine Cramer is in blank, and whatever may have been intended by Cramer and his wife as to the value of the land being credited on the Fellers bond, the intention was never carried out. In fact, there is nothing in the record upon which it could be successfully claimed that there was any such intention. On the contrary, the deed to Catherine Cramer from the heirs of Emanuel Hise was recorded along with the contract between said heirs and A. Cramer, in which it is specifically stated that "the said parties of the first part, for and in consideration of the sum of \$200, to be paid in manner as follows, viz.: the said party of the second part (A. Cramer) holding claims which are to be properly authenticated, against the estate of Emanuel Hise, deceased, is to have credit on the purchase money in part payment of said claims at the date of these presents, in accordance with articles of agreement made and entered into heretofore by the parties of the first part," etc. The "parties of the first part" in the contract and in the deed are the same persons, and Catherine Cramer presents no other contract between her and the parties of the first part except the one attached to and recorded with the deed to her, which contract is made not with her, but with her husband, A. Cramer. That



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Emanuel Hise was indebted to A. Cramer is admitted in the answer in this cause, and there is not the slightest testimony to show that Emanuel Hise was ever indebted to Catherine Cramer. She never, at any time, presented a claim against the estate of Emanuel Hise, deceased, but her husband, A. Cramer, did present a claim in his own favor, and in his settlement as administrator of Hise there is a debt reported in his favor for \$185.56, and no funds with which to pay it. It also appears, which is significant, that in a chancery suit brought to sell the lands of Emanuel Hise, deceased, A. Cramer did not present his claim for payment at all, the said suit having been brought after the deed for the ten acres of land had been made to his wife. It appears from the evidence of the parties of the first part to that deed, that they never received any consideration whatever from Catherine Cramer for the conveyance, but that it was fully understood that it was made in settlement of the claims that A. Cramer held against their father, Emanuel Hise, deceased, and in pursuance of the contract they had made with A. Cramer.

It thus appearing that the consideration for that conveyance was the satisfaction of the indebtedness of Emanuel Hise's estate to A. Cramer, there is no ground left upon which Catherine Cramer could rest her contention that she, in fact, paid the consideration for that land by crediting the value thereof upon the Fellers bond, A. Cramer, at the same time, surrendering his claim against the estate of Emanuel Hise. The deed being, therefore, voluntary as to Catherine Cramer, the consideration therefor having been paid with the means of her husband, it was rightly decided by the court below that the land it conveyed was liable for the debts of A. Cramer.

The further contention is made, that, even if the consideration for the conveyance was given by A. Cramer to his wife, the gift was before the indebtedness to appellees arose, and, therefore, the land is not subject to the lien of the judgment of appellees. But this contention is also without facts in the record

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to sustain it. The indebtedness of A. Cramer to appellees grew out of the contract of September 26, 1896, wherein he fraudulently represented himself to be the agent to sell the timber of the Shenandoah Land and Anthracite Coal Co., and pursuant to that contract, A. Cramer became indebted to appellees long before the deed of conveyance from the heirs of Emanuel Hise to Catherine Cramer, by reason of the fact that he had received money from appellees fraudulently and wrongfully, which appellees had a right to demand and recover of him. True, there was no adjustment of the account between the parties until after the deed from the heirs to Catherine Cramer, but that would not change the fact that A. Cramer was the debtor of appellees prior to that conveyance.

It seems clear from the evidence that the effort to secure the title to the ten acres of land in question in Catherine Cramer, was purely an after thought, and the effort on the part of Cramer and his wife to show the *bona fides* of that transaction, utterly fails.

The decree of the circuit court must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

CHESAPEAKE & OHIO RAILWAY CO. v. PARIS' ADMINISTRATOR.

November 21, 1907.

Absent, Cardwell, J.

1. *CARRIERS—Railroads—Persons Assisting Passengers—Time to Leave Train—Notice.*—A person who, in conformity with a custom acquiesced in by a carrier, goes to a railroad station to assist passengers in entering or leaving the train, is an invitee to whom the carrier owes the duty of ordinary care to see that he is not injured by reason of defective station facilities or approaches thereto. If he enters the train and his purpose is known, it is the duty of the carrier to give him a reasonable time within which to leave the train, but, if his purpose is not known, and there are no circumstances to put the carrier upon notice, then the carrier is not bound to hold the train till he has had time to alight, nor to notify him before the train starts.
2. *RAILROADS—Stepping off Moving Trains—Interference by Brakeman—Emergency.*—It is the duty of a brakeman on a passenger train to endeavor to prevent one from stepping off a moving train when it is dangerous to do so, and if, while acting in good faith to prevent an apparent danger, his efforts fail, and the person steps or falls off and is injured, there can be no recovery against the company, although it is probable he might have alighted in safety but for the interference of the brakeman.

Error to a judgment of the Circuit Court of Augusta county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

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Opinion.

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*R. L. Parrish*, for the plaintiff in error.

*Peyton Cochran* and *Charles Curry*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in the circuit court (defendant in error here) brought this action to recover damages for the death of his intestate, James R. Paris, alleged to have been caused by the negligence of the plaintiff in error, the Chesapeake and Ohio Railway Company.

Treating the case as upon a demurrer to the evidence, the essential facts are as follows: The intestate, who, at the time of the accident was 76 or 77 years of age, accompanied his daughter, an intending passenger, from their home in Staunton, Virginia, to the company's station in that city. On the arrival of the train, the conductor and brakeman, as usual, stationed themselves at the front end of the rear coach to assist passengers in leaving and entering the cars. The intestate escorted his daughter into the rear car, carrying her hand-baggage, and secured a seat for her about midway the coach. The train crew did not know, and there was nothing to lead them to suspect, that he was not a passenger, or that he intended to get off. That he had ample time, in the exercise of ordinary care, to have left the train in safety, is shown by the circumstances that it remained at the station five minutes, two minutes longer than the regulation stop; and that the conductor, after giving the leaving signal, boarded the train and went into the forward car to take up tickets before the intestate appeared on the front platform of the rear coach.

The account given by some of the plaintiff's witnesses of occurrences at the moment of the accident, is that, while the intestate was descending the steps, the train was put in motion, and thereupon, he was seized from behind by a brakeman on

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the platform of the car; that he turned his head and looked at the brakeman, and then either broke his hold or was turned loose and fell to the station platform below, and rolled thence under the moving train, between the rail and platform, and was struck by the step on the rear end of the coach and fatally injured. Though several witnesses expressed the opinion that the intestate could have alighted in safety but for the interference of the brakeman, there is no suggestion that the latter was not acting in good faith in his effort to rescue the intestate from the peril of jumping off the moving train.

The rule of law regulating the duty of a railway company to persons coming to stations to assist passengers, is correctly stated in 2 Hutchinson on Carriers (3rd ed.), sec. 991: "A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, as he comes with at least the tacit invitation of the carrier. While so engaged, he does not stand in the relation to the carrier of a bare licensee, but is deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier, therefore, owes to him the duty of exercising at least ordinary care to see that he is not injured by reason of defective station facilities or approaches thereto.

"So one who goes on a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. \* \* \* But the duty of the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to move after giving him a reasonable time to get aboard. He should, accordingly, notify

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some one in the management of the train of his presence, business or purpose, so as to create some relation to the carrier, and thus make it its duty to care for him. And when the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another, intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train has started." See also *Shearman & Redfield on Negligence* (5th ed.), section 492a; *Little Rock &c. Ry. Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48, and notes.

Applying these just rules to the facts of this case, it is clear that the plaintiff has wholly failed to fix actionable negligence on the defendant company. It was the brakeman's duty to have endeavored to protect the intestate from danger incident to his stepping off a moving train, and if, perchance, disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

"One who, by his own negligence, has placed another in an emergency, cannot require of that other the wisest possible action in order to save him from the consequences of his own fault." *Wise Ter. Co. v. McCormick*, 104 Va. 400, 51 S. E. 731.

We are of opinion that the judgment complained of should be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

*Reversed.*

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Statement.

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**Richmond.**

## CHESAPEAKE AND OHIO RAILWAY CO. v. FORTUNE.

November 21, 1907.

1. **RAILROADS—*Passenger's Attendant—Invitees—Care Due.***—One who accompanies his wife and small children to a railway station, where they expect to take a train and become passengers, is there by the implied invitation of the railroad company, and it is the duty of the company to exercise ordinary care for his safety and protection.
2. **RAILROADS—*Stopping at Stations—Reasonable Time.***—It is the duty of a railroad company to stop its trains a reasonable time at stations to enable passengers and baggage to be put on; and passengers and their attendants have a right to presume that the company will do so.
3. **EVIDENCE—*Impeaching Witness—Rehabilitation.***—Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence if his general reputation for truth.
4. **VERDICTS—*Excessive Damages.***—The verdict of a jury in an action to recover damages for a personal injury will not be set aside as excessive unless the damages allowed are so excessive as to indicate that the jury were influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.
5. **INSTRUCTIONS—*Jury Sufficiently Instructed—Harmless Error.***—If the instructions given in a case are correct and fully cover the case, and are sufficient to enable the jury correctly to apply the evidence, it is not error to refuse to give other instructions offered, even though they correctly compound the law. It is a case of harmless error.

Error to a judgment of the Circuit Court of Alleghany

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county, in an action of trespass' on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*R. L. Parrish*, for the plaintiff in error.

*Jno. T. Delaney* and *Geo. A. Revercomb*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

R. L. Fortune brought suit in the circuit court of Alleghany county to recover damages for the loss of his leg, occasioned, as he alleges, by the negligent conduct of the Chesapeake and Ohio Railway Company. There was a verdict and judgment in his favor for \$5,500, to which the railroad company obtained a writ of error.

The first assignment of error is that the court overruled the demurrer to the declaration.

There were five counts in the declaration, which state the plaintiff's case in a manner somewhat varying as to details; but the cause of action is set forth substantially as follows: That Fortune accompanied his wife and two small children, aged respectively two and four years, to "Mallow," a station on the Chesapeake and Ohio Railway, his wife and children intending to take train No. 14; that the station is what is known as a flag station, at which there is no depot, ticket office, baggage office, platform, portable step, or any other means or appliance to facilitate ingress and egress to and from the trains that stop at that station; that the train stopped at a point where the public road crosses the railroad track, so that a passenger could step from the road upon the steps leading to the platform of the coach appropriated to colored people, or upon that ap-



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propriated to white passengers, which was the last coach in the train; that, after his wife and two children had been assisted to the platform of the coach for colored people, they passed across the platform to the rear coach, in which they were to be accommodated, and defendant in error, who had in his charge a valise or telescope belonging to his wife, and while the train was still at rest, undertook to put the valise or telescope upon the platform, so that his wife could take it with her, but while so engaged, and in a position perfectly open and obvious to the train crew, the train was put in motion, he was carried along with it, and received the injury for which he sues.

The theory of defendant in error (plaintiff in the court below) is, that, having accompanied his wife and children, who intended to become passengers on the Chesapeake and Ohio Railway, to the station, he was there by invitation, and that it was the duty of the railroad company to use reasonable and ordinary care not to do him an injury.

The theory of plaintiff in error is that, Fortune was, at most, a mere licensee, to whom the railroad company owed no duty, except that it should not injure him wilfully or recklessly.

We are opinion that the position of plaintiff in error cannot be maintained. We think it plain, that one who accompanies his wife and small children to a station where they expect to take a train and become passengers, is there by the implied invitation of the railroad company; that it is the duty of a person upon the premises of a railroad company for such a purpose to exercise reasonable precaution for his own safety, and proceed with reasonable diligence to discharge the duty in which he is engaged; and that, while upon the premises under such conditions, it is the duty of the railroad company to exercise ordinary care for his safety and protection. This proposition seems to us, too plain to need either argument to enforce it, or authority to maintain it.

Without discussing the numerous cases cited, we shall content ourselves with an extract from 5 Am. & Eng. Ency. of

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Law (2nd. ed.) 518: "Persons going upon a carrier's premises or entering a carrier's vehicle to assist a passenger, to greet an arriving passenger, or to take leave of a departing passenger, cannot be deemed passengers themselves. Nor are they trespassers, properly speaking; they should be considered rather in the light of licensees, to whom the carrier owes certain duties."

And in *Fetter on Carriers of Passengers*, sec. 237, it is said: "One who escorts a passenger to a station or to a seat in a train is not a mere trespasser, to whom the company owes no duty, except to abstain from wilful injuries; nor, on the other hand, is he a passenger towards whom the company is bound to the exercise of the highest degree of care and skill; but he is on the company's premises on its implied invitation, and it is bound to exercise ordinary care for his safety."

The second error assigned is to the action of the trial court in permitting the attorney for defendant in error to ask the following question: "When you attempted to put the baggage on, the train was standing still. Did you believe the train would remain standing still until your wife could get in the car where she had to go, and until you could get the baggage on?" A. "That is what I expected."

The objection taken to this ruling is that Fortune showed by his own testimony that he had never been to Mallow station but once before; that he was unfamiliar with the surroundings; and he did not know what time trains usually stopped at Mallow, and had no right to presume that they would stop any given length of time. All of which is, perhaps, true; but it still remains that it was the duty of the company to stop a reasonable length of time to enable passengers and baggage to be put upon the train, and Fortune had a right to suppose that the railroad company would discharge that duty.

The third assignment of error is to the action of the court in admitting character evidence as to R. L. Fortune's general reputation for truth and veracity, when his reputation for truth and veracity had not been assailed, and the proof of such repu-

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tation by persons who were not sufficiently acquainted therewith.

The examination of Fortune was such as to bring the case within the influence of *George v. Pilcher*, 28 Gratt. 299, 26 Am. Rep. 350, where this court said: "Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth."

The fourth assignment of error is that the verdict is excessive, and that it is contrary to the law and the evidence.

Fortune was a man of good character, good health, in the prime of life, and he suffered the loss of a leg. This court has said in numerous cases, that there being no exact standard by which it is possible to ascertain in money the value of the various elements of damage proper for the consideration of a jury in such a case, this court would not disturb the finding of a jury, unless the damages were so excessive as to furnish evidence of partiality or prejudice, or some corrupt motive, on the part of the jury.

We shall refer only to one case. In *Farish & Co. v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666, there was a verdict and judgment for the plaintiff for \$9,000. In that case the plaintiff was injured by the overturning of a stage-coach; his head was severely cut, and one of his legs was broken above the ankle, and at the time of the trial, which occurred about one year after the accident, his leg was not entirely healed, and was shortened, the ankle joint was swollen and stiff, and he was obliged to use crutches. The attending physician expressed the opinion that he would be a cripple for life. The court held that the verdict in such a case could not be disturbed, unless the damages allowed were so excessive as to warrant the belief that

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the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

The fifth assignment of error is to the giving of instructions asked for by the plaintiff, and the refusal to give instructions Nos. 2 and 3, asked for by the defendant.

Without going into a particular discussion of the instructions, we are of the opinion that there is no error in the instructions given; that they fully covered the case, and were sufficient to enable the jury correctly to apply the evidence; and that, even though defendant's instructions were in themselves free from objection (about which we express no opinion), the refusal to give them was, under such circumstances, harmless error.

With respect to the evidence, we find that it was ample to support the averments of the declaration; and upon the whole case, we are of opinion that there was no error to the prejudice of the plaintiff in error, and the judgment is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## COFFMAN v. LIGGETT'S ADMINISTRATOR AND OTHERS.

November 21, 1907.

Absent, Cardwell, J.

1. *ASSIGNMENTS—Delivery—Case in Judgment.*—In order to constitute a valid assignment of a chose in action, the assignor must part with his power of control over it, and the evidence of the assignment must be so delivered as to be irrevocable by the assignor. In the case in judgment, the evidence does not establish a delivery of either the chose in action or of the assignment thereof.
2. *ASSIGNMENTS—Contest Between Assignees—Notice—Legal Title.*—As between two *bona fide* assignees for value of an insurance policy, the second assignee will be preferred where it appears that he not only took his assignment in good faith and for full value and without notice or knowledge of the prior assignment, but also gave notice of his assignment in writing to the insurer, and was recognized and accepted by it in writing as such assignee, and acquired the complete legal and equitable title to the policy; whereas, the first assignee did not even know of the existence of his assignment and hence took no steps to protect his interest. Where equities are equal, the law will prevail.

Appeal from a decree of the Circuit Court of Rockingham county. From a decree in favor of Lurty, Coffman appeals.

*Affirmed.*

The opinion states the case.

*Harnsberger & Harnsberger*, for the appellant.*Sipe & Harris*, for appellee.

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Opinion.

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HARRISON, J., delivered the opinion of the court.

The life of Winfield Liggett was insured, for his own benefit, by policy No. 2996, in the Life Insurance Company of Virginia, for the sum of \$3,000, which has been paid, and is now under the control of the circuit court of Rockingham county in this suit. The matter in controversy is the right of priority in the distribution of this fund between certain creditors of Winfield Liggett, the insured, each of whom claims, under an assignment of the policy from which the fund was derived, made by the insured in his lifetime.

The record shows that on the 29th day of November, 1901, while the policy was still in his possession and under his control, the insured assigned and transferred the same to W. S. Lurty, as collateral security for the payment of a bond for \$1,000 executed by Liggett to Lurty. It further appears that on the 12th day of September, 1904, the entire policy was, for value received, assigned and transferred by the insured to W. S. Lurty, subject only to a debt of \$274 and its interest, borrowed money due from the insured to the company. The completeness of Lurty's purchase of the policy, under the assignment and transfer last mentioned, cannot be questioned. Due notice of this assignment, acknowledged before a notary public, was given in writing to the company, and recognized and accepted by it in writing. Prior to this assignment to Lurty of September 12, 1904, the policy had been, in January, 1904, assigned by the insured to N. W. Berry, to secure him as endorser of a negotiable note for \$670.

After the death of Winfield Liggett, which occurred on the 16th day of February, 1905, there was found with his papers in his office safe, the following paper, dated February 26, 1895, signed by him, under his hand and seal:

"I hereby transfer and assign to Maggie G. Coffman so much of my life insurance policy, in the Life Insurance Com-

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pany of Virginia, as will be sufficient to pay to her whatever amount I may owe her at the date of my death."

It appears that several years before the date of this paper Maggie G. Coffman had placed in the hands of Winfield Liggett, who was a practicing attorney of the Harrisonburg bar, certain funds to be invested by him as her attorney. These funds were invested at first, but were afterwards collected by Liggett and appropriated to his own use, he thereby becoming the debtor of Maggie G. Coffman, which relation he continued to occupy until his death.

The sole question to be determined is whether, under the circumstances disclosed by the record, Maggie G. Coffman, the appellant, is entitled to priority in the distribution of the fund arising from this policy; it being insisted that she has the first right because the assignment in her favor was prior in time to that under which the appellee Lurty claims.

It is contended on behalf of the appellee, that there was no complete assignment of this policy to the appellant; that the alleged assignor retained the power of revocation by retaining the paper relied on in his possession, and never delivering the same; and that, having his power of revocation, he had the power to make a subsequent valid assignment of the policy. On the other hand, it is contended, on behalf of the appellant, that the assignor, Liggett, was her trusted attorney and agent to invest her funds; that, when he wrote the assignment of the policy for her benefit, and placed the same with her papers in his safe, it was a constructive delivery; and that he thereafter held the paper as her agent, without power to impair her rights in the policy by a subsequent assignment thereof.

So far as the record shows, the existence of the paper under which the appellant claims, was never known to any one but its author until after his death, when it was found by his administrator, together with a statement of his indebtedness to the appellant and a letter relating to her investment, in a filing envelope in the decedent's office safe. It is not clear

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from the record that appellant knew that Liggett had reduced her investment to money and was himself her debtor. She does not appear to have ever demanded any security of Liggett as her debtor, nor does he appear to have ever promised to furnish any security; nor was any mention or intimation with respect to the policy in question ever made to her by him, although he appears to have written her letters with respect to her investments. The paper relied on as an assignment was kept within its author's own knowledge, and within his own exclusive power and control. There was never a moment that appellant had any power or control over the paper.

It is true, as insisted, that delivery is a matter of intention, and that the form of assignment is not material. *Skipwith's Ex'or v. Cunningham*, 8 Leigh 271, 31 Am. Dec. 642; *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871. But the evidence does not show that Liggett ever intended to deliver the alleged assignment to the appellant. He did send her word not to be uneasy about her investments, that her money was safe; but all of his communications studiously avoid any mention of the policy or any intention to deliver the alleged assignment. The absence of intention to deliver the paper in question is further shown by the fact that Liggett retained possession of the policy, used it as collateral security, borrowed money upon it, and finally transferred and assigned it to the appellee for full value received. Whatever may have been Liggett's purpose when he first wrote the paper now in controversy, that purpose was never consummated, because of his power to recall it; and when the absolute assignment was made to Lurty, the purpose theretofore existing, if any, to assign to appellant, was abandoned.

The rules of the insurance company require that an assignment of its policies shall be made in duplicate and sent to the company for acknowledgment, when one is returned to the assignee of the policy, and the other retained by the company. This was never done with respect to the alleged assignment under which appellant claims. The appellee acquired, for value



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received, the complete legal and equitable title to the policy, giving the company due notice of the assignment to him without any notice or knowledge of the paper under which appellant claims, and without any means of ascertaining that such a paper was in existence.

In Pomeroy's Equity it is said that a subsequent assignee takes superior to a prior equity when the second assignee, in good faith and without notice of a prior outstanding equity, protects or supports his own interest by obtaining a legal title, or legal position, and that in such a case, the general doctrine that an assignment is subject to outstanding equities of third persons, does not apply. 2 Pom. Eq. sec. 698, and note.

The Supreme Court, considering the same subject, points out that the general rule, "first in time, best in right," has exceptions, and that a subsequent assignee of a pure thing in action will be protected by a court of equity in any advantage which he has gained by his own diligence, or by the neglect of a prior assignee. In a well-considered case, the court says: "Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence can be imputed to him, then the case is one where an equity was successively assigned in a chose in action to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here, Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect. Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail." In this case, it is further said: "The assignment was held up, and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree." *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 331. See also *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393; *Graham*

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*Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26; 44 L. R. A. 632; *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782.

The decisions of this court are, we think, to the effect that the assignor of a chose in action must part with the power of control over the thing assigned, and that the evidence of assignment must be so delivered as to be irrevocable by the assignor. *Tatum v. Ballard*, *supra*.

The case of *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, involved the validity of the gift of an insurance policy by the insured to a third party. The doctrine was there announced with respect to a gift, which was without consideration, that there must be a delivery of possession of the thing given, or the means of obtaining it, so as to make the disposition of it irrevocable.

There is nothing more common in the business life of the present day than the assignment of insurance policies as collateral security for borrowed money. If a secret equity, such as that sought to be enforced by the appellant, could prevail against a bona fide purchaser of a policy, such as Lurty is shown to have been, the result would be disastrous to the use of these policies as a means of borrowing money.

We are of opinion that, under the facts and circumstances of this case, there was neither an actual nor a constructive delivery of the assignment in question to the appellant, or to any one for her benefit. The circuit court, therefore, did not err in holding that the transfer of the policy to W. S. Lurty was to be preferred in equity and right to the alleged assignment thereof to appellant, and its decree must be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.**

DICE AND OTHERS v. SHERMAN.

November 21, 1907.

Absent, Cardwell, J.

1. **EMINENT DOMAIN—Public Use.**—Private property cannot be condemned “for the purpose of securing the necessary power to operate a public cider mill and the machinery of a certain public telephone exchange now on the land” of the petitioner, in the absence of any averment or proof of the public benefit to be derived therefrom. The private benefit of the petitioner too clearly predominates the public interest to justify the condemnation. The test of a public use is whether a public trust is imposed upon the property taken—whether the public has a legal right to the use which cannot be gainsaid, denied or withdrawn by the owner after the condemnation and appropriation.

Error to a judgment of the Circuit Court of Augusta county, in a condemnation proceeding. Judgment for the petitioner. Defendants assign error.

*Reversed.*

The opinion states the case.

*Charles Curry and T. K. Hackman*, for the plaintiffs in error.

*Timberlake & Nelson*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The foundation of this proceeding was an application, under

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section 1347 of the Code, to the circuit court of Augusta county by the defendant in error, for leave to erect a dam. The petition is brief, and in these words:

"Your petitioner, John W. Sherman, respectfully represents that he is the fee simple owner of a certain tract of land, situated at Burktown, in Augusta county, Virginia, on the waters of the stream commonly known as Naked Creek. On the opposite side of said creek is another tract of land belonging in fee simple to M. C. Dice, Mrs. K. Landes (formerly Dice), Miss Cornelia Dice, and Miss Annie C. Dice.

"Your petitioner desires to erect a dam across and in the said stream for the purpose of securing the necessary power to operate a public cider mill and the machinery of a certain public telephone exchange, now on the said land, belonging to the undersigned, and he prays that the court may grant him leave to erect such a dam, and to appoint five disinterested freeholders as commissioners, in the manner prescribed by law, to ascertain what will be a just compensation to the several owners of said land arising by reason of the erection of said dam, and to perform such other duties as may be required of them by law in this regard."

The proceedings had under this petition resulted in a judgment in favor of the applicant, condemning the lands of the plaintiffs in error, and authorizing the erection of the dam for the purposes set forth in the petition. The right to this judgment was vigorously contested in the circuit court, chiefly upon the ground that the erection of the dam in question would practically destroy the use of a mill a very short distance above, on the same creek, owned by the plaintiffs in error, which had been established and in operation for nearly one hundred years.

In the view we take of the case, this phase of the controversy need not be considered, for we are met at the threshold with a vital question, which arises on the face of the proceeding—that is, whether or not the judgment complained of is a taking

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of private property for a private purpose, which is not authorized.

It will be observed, as shown by the application to the circuit court, that the defendant in error desires to secure the necessary power to operate a cider mill and the machinery of a telephone exchange, *now* on the land belonging to him. It is true, that in his petition he calls the structure or structures a "public cider mill," "and the machinery of a certain public telephone exchange," but there is nothing on the face of his petition, and not a word in the record, to show that the public has the slightest interest in either.

This court, in the recent case of *Fallsburg &c. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L. R. A. 129, citing Lewis on Eminent Domain, and other authorities, says: "The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn by the owner." It is there further said: "Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain well-defined rights to that use secured, as the right to use the public highway, the public ferry, the railroad, and the like. But, when it is so appropriated that the public have no right to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use." *Jordan v. Woodward*, 40 Me. 317.

In his work on Constitutional Limitations, p. 654, Judge Cooley says: "The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

The *Fallsburg case*, *supra*, was much stronger than the case at bar for upholding the right to condemn, and this court

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affirmed the judgment in that case, dismissing the proceeding as an attempt to condemn private property for private uses.

When the power of eminent domain is invoked, it must be made clearly to appear that the property sought to be condemned is useful to the public, and the existence or non-existence of a public use in any given case must be determined by the court. *Fallsburg case, supra; Varner v. Martin*, 21 W. Va. 550.

The purpose for which the property is sought to be taken in the case at bar does not clearly appear to be for a public use or public purpose. On the contrary, the grounds of public benefit upon which the taking is proposed, are vague, indefinite and uncertain, and the use which the public is to have of the property, or the manner in which it is to be benefited by such use, is by no means fixed and definite, and may be gainsaid, denied, or withdrawn, so far as the record shows, at the will of the defendant in error.

As said in the *Fallsburg case, supra*, "The private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for a private use, against the will of the owner, which cannot be done in any case."

The judgment complained of must, therefore, be reversed; and this court proceeding to enter such judgment as the circuit court ought to have entered, it is ordered that the petition there filed by the defendant in error be dismissed.

*Reversed.*

## Statement.

**Richmond.**

GRASTY v. LINDSAY.

November 21, 1907.

Absent, Cardwell, J.

1. INSTRUCTIONS—*Evidence to Support*.—An instruction is properly refused when predicated on the existence of a fact denied by the testimony of the party offering the instruction.
2. CONTRACTS—*Right Reserved to Terminate—Failure to Exercise—False Representations—Burden of Proof—Case at Bar*.—Plaintiff contracted to bore a well for the defendant at a stated price per foot, the defendant reserving to himself the absolute right to stop the work at any time he saw fit, upon payment of the contract price for work done. After a depth of five hundred feet had been reached, for which payment was subsequently made, defendant claims that the plaintiff falsely represented to him that he had reached flat rock, and that but for such representation the defendant would have stopped the work, but the boring was allowed to proceed one hundred and thirty feet deeper, for the price of which this action was brought. The trial court instructed the jury that, if the defendant claims that he would have exercised his right and stopped the work, but for the representation made to him by the plaintiff, the burden is on the defendant to prove, by a preponderance of the evidence, to the satisfaction of the jury that such representation was, as a matter of fact, untrue, and that the defendant relied upon and was misled by such representation. There was a verdict for the plaintiff for the amount of his claim, and this verdict and the instruction of the trial court are approved by this court.

Error to a judgment of the Circuit Court of Augusta county, in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

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Opinion.

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*Fitzhugh Elder*, for the plaintiff in error.

*Timberlake & Nelson*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This was an action in assumpsit brought in the circuit court of Augusta county by Samuel Lindsay against Thomas P. Grasty, to recover the sum of \$325. The defendant pleaded *non assumpsit*, and a jury being empaneled found a verdict in favor of the plaintiff for \$325, to which a writ of error was allowed by one of the judges of this court.

Lindsay and Grasty entered into a written contract on the 28th day of April, 1905, by which Lindsay undertook to bore a well on the premises of Grasty. So much of the contract as is material to the issue before us is as follows: “\* \* \* the said Lindsay agrees to begin the work at once and to carry it on continuously to completion and to the production of a satisfactory flow of water, unless the work shall be stopped by the party of the first part; the party of the first part agrees to pay for said work at the rate of \$2.50 per foot in cash upon the completion of the work, whether the same shall be stopped by the party of the first part or shall be continued to completion, and agrees to pay the amount above stipulated in cash upon the completion of the work.”

After the well had been bored to a depth of nearly 500 feet, at a cost of \$1,250, all of which has been paid, Grasty began to doubt whether or not a supply of water could be obtained at that point. He thereupon consulted Charles Catlett, a geologist of repute, who advised him, after an inspection of the premises, that the inclination of the limestone rock at that point was such as to render it exceedingly improbable that water would be found. Grasty went then to Lindsay and had some conversation with him upon the subject, informed him of his fears and of the opinion of Mr. Catlett, and said to him that he did not



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care to go beyond the 500 feet. Lindsay continued to bore, and informed Grasty that, in his opinion, they had gotten through the inclined strata of rock, and had reached flat rock. Grasty, it seems, was doubtful whether or not this conclusion was correct, and so expressed himself, according to his testimony, to Lindsay, who replied to him: "I know that the drill is now in flat rock."

Grasty, in his cross-examination, in reply to the question, "Did you ever, at any time, exercise your right, under the contract, and stop Lindsay from the work?" replied: "No, I cannot say that I stopped him; he came and said, 'Mr. Grasty, I have another job over in Albemarle;' and I said, 'You had better take it.' I was willing for him to resume drilling on his return if he could prove to me definitely that he was in flat rock." And further, in the course of his examination, the defendant testified that the plaintiff never did, at any time, in express terms, agree that the boring of the well beyond the depth of 500 feet was to be at the risk and cost of plaintiff and without charge in the event the rock beyond that depth could not be shown to be flat or horizontal to defendant's satisfaction; but that this was the inference drawn by defendant from the statement of plaintiff that he had struck flat rock, and that he was willing to risk his reputation as a well-digger upon it. Defendant further testified on cross-examination that "his position in this case is just this: that he expected the plaintiff to stop when he reached a depth of 500 feet; that he did not stop plaintiff at the depth of 500 feet, because at or about the time the well reached that depth, plaintiff told him that he had struck flat rock; that, relying upon this representation, which he now believes to have been untrue, he forebore to stop plaintiff, and allowed him to continue; that, but for such representation by the plaintiff, he would have stopped him, as he had the right to do under his contract, at the depth of 500 feet."

The plaintiff testified, that the point at which he began boring was designated by the defendant; that the first stratum

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of limestone rock which he encountered was slanting; that this was readily determined by the way the bit struck upon it; that there is no difficulty whatever in telling how rock lies—whether flat or slanting at an angle—as the bit used in boring is constantly turned and the edge only bites into the rock when it is first encountered, and it is only when the hole has gotten a good start that it begins to strike squarely; that Mr. Grasty was present frequently during the drilling operations, and asked a great many questions, which he, the plaintiff, always answered gladly; that the well was frequently tested from time to time in the presence of the defendant; that when he, the plaintiff, had bored through two strata of rock, he got a supply of water which he thought would probably be sufficient; that the well was tested with a pump, and the defendant said that he desired more water and wanted the well drilled deeper; that the depth of the well at this time was nearly five hundred feet; that the drilling was accordingly continued into the next or third stratum of limestone rock; that when this last stratum of rock was encountered, the bit struck it squarely all around, thus indicating that the rock presented a flat surface at the point of the bit; that he told Mr. Grasty that the bit had struck flat rock; that it was, of course, impossible for him or anyone else, to tell the extent of the flat rock, or to tell anything about its slope except at the point of the bit; that when the well reached a depth of 630 feet, or about that time, he, the plaintiff, received a letter from a gentleman in Albemarle—a Mr. Patterson—requesting him to drill a well for him at his place near Charlottesville; that plaintiff told defendant of Mr. Patterson's request, and asked defendant if he would allow him to move his machinery to Albemarle and bore this well for Mr. Patterson, and then return and complete defendant's well; that defendant said that he would permit plaintiff to do this, provided he would return as soon as possible and complete his well; that plaintiff thereupon went to Albemarle and bored Mr. Patterson's well, and when he returned he notified de-

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defendant that he was ready to complete the work on his well; that defendant said that he had installed a gasoline engine and pump and wanted to test the supply of water already obtained before he had any more work done; that some time after this, the defendant having paid only \$1,000, plaintiff asked him to pay the balance; that defendant stated that he had no money on hand, but would give a note for \$250, which he would pay in a short time; that plaintiff agreed to this, and the note was taken and discounted, and was paid when it fell due; that up to this time, plaintiff had never heard one word from the defendant as to any dispute about the well or the amount due, or any claim on the part of the defendant, that he, the plaintiff, had made any untrue statement or representations as to the character of the rock in which he had bored; that the first intimation he had of any trouble was when the note was given; that the note was not given or accepted in full payment of the balance due on account of the well; that the amount paid him was \$1,250, which was paid in three payments; that the balance due is \$325; and that he tried repeatedly to get defendant to pay this balance, but defendant refused to do so, saying that he would pay it when it was proven to him that the last stratum of rock was flat.

Upon this evidence, defendant asked the court to give the following instruction: "The court instructs the jury, that if they believe from the evidence that the defendant, Thomas P. Grasty, instructed the plaintiff, Samuel Lindsay, to stop boring the well on the Grasty premises after a depth of five hundred feet had been reached, as he had a right to do under the contract relating to the boring of said well, and that said five hundred feet of well had been paid for, and that the boring after said depth of five hundred feet had been reached, was upon the guarantee by the said plaintiff, Lindsay, to the defendant, Grasty, that he, the said Lindsay, was then boring in a horizontal or flat strata of rock, then they must find for the defendant, unless they further believe from the evidence that

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said Lindsay, as a matter of fact, after said five hundred feet had been reached, was actually boring in a horizontal or flat strata of rock."

This instruction was rejected by the court. It could not have done otherwise. It is predicated upon the fact that Thomas P. Grasty instructed the plaintiff to stop boring after a depth of five hundred feet had been reached, in the face of Grasty's own testimony that he had never directed Lindsay to stop the work.

The court gave to the jury the following instruction: "The court instructs the jury that, under the contract between the plaintiff and the defendant in issue in this case, the defendant had the absolute right to stop the plaintiff from boring the well at any time he saw fit to do so. And if the defendant claims that he would have exercised this right and stopped the plaintiff, but for a representation made to him by the plaintiff, the burden is on the defendant to prove, by a preponderance of evidence to the satisfaction of the jury, that such representation was, as a matter of fact, untrue, and that the defendant relied upon and was misled by such representation. Unless the defendant has proven both of these facts by a preponderance of evidence, to the satisfaction of the jury, the jury must find a verdict in favor of the plaintiff."

We think there was no error in this instruction. Plaintiff in error complains that the instruction is grossly misleading and erroneous, first, because it imputed to the defendant a theory of defense which he never entertained, and which there is no evidence to support; and, second, because it instructs the jury erroneously upon such theoretical defense.

That there is evidence to support it appears from the testimony of the defendant himself, as follows: "He did not stop plaintiff at the depth of five hundred feet, because at or about the time the well reached that depth, plaintiff told him that he had struck flat rock; that, relying upon this representation, which he now believes to have been untrue, he forebore to stop plaintiff, and allowed him to continue; that, but for such

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representation by the plaintiff, he would have stopped him, as he had the right to do under his contract, at the depth of five hundred feet."

Upon this evidence, and guided by this instruction, the jury found a verdict for the plaintiff for the sum of \$325, upon which the circuit court entered judgment.

We find no error to the prejudice of plaintiff in error, and the judgment of the circuit court is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## GIVENS AND OTHERS v. CLEM.

November 21, 1907.

Absent, Cardwell, J.

1. **APPEAL AND ERROR—Parties.**—A widow who has not renounced her husband's will has no interest in land devised by him solely to his children, and cannot appeal from a decree adverse to the interest of the children, although a party to the suit in which the decree was rendered.
2. **APPEAL AND ERROR—Infants—Guardian ad Litem—Next Friend.**—A guardian ad litem may appeal in the names of the infants, by himself as such guardian, from a decree adverse to their interest, but if he fails to do so, the infants may appeal by some one as their next friend.
3. **SPECIFIC PERFORMANCE—Discretion—Sale by Executor—Injury to Beneficiaries.**—Specific performance rests in the sound judicial discretion of a court of equity, and will not be decreed against an executor, although he has a discretionary power of sale, where it would be prejudicial to the interests of infant beneficiaries who oppose the sale, and where the executor himself has refused to perform; but the purchaser will be left to his remedy at law against the executor. Although an executor acts in good faith, and within his powers, he will not be compelled to perform against the interest of his beneficiaries, even though the court would have compelled performance between two persons acting for themselves only.

Appeal from a decree of the Circuit Court of Augusta county.  
Decree for complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

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Opinion.

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*Bumgardner & Bumgardner*, for the appellants.

*Turner K. Hackman*, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

The appellee instituted this suit against the executor, widow and children of W. C. Givens, deceased, for the specific execution of an agreement for the sale and purchase of a parcel of land belonging to the estate of the decedent, entered into between the appellee as purchaser and the executor as vendor.

The decedent devised the said land to his five children, all of whom were infants, but authorized his executor to manage and control the same during the minority of his youngest child, and to that end directed that he should receive all the rents and profits arising therefrom, and use the same in the maintenance and support of the children; and gave him the further authority to sell and convey the same, at any time during that period, if, in his judgment, the interest of the children would be promoted thereby.

After entering into the executory agreement for the sale of the land, the executor refused to complete the sale by conveying the property to the purchaser. Thereupon the appellee instituted this suit.

The defense relied on by the children, who answered by guardian *ad litem* (no answer being filed by the executor), was, that the executory agreement of sale should not be specifically executed, because it was prejudicial to their interests.

The circuit court directed one of its commissioners to make inquiry and report whether or not the complainant was entitled to a specific execution of the contract, and whether the confirmation of the sale by the court would be advantageous or prejudicial to the interests of the infant defendants. The commissioner reported that the infant defendants would be prejudiced by confirming or specifically executing the agreement of

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sale, but that, under the law, notwithstanding that fact, the purchaser was entitled to the relief sought by his bill. The circuit court decreed that the agreement should be specifically performed; and from that decree the decedent's widow and the infant defendants, by her as their next friend, presented their petition for an appeal, which was allowed.

The appellee asks that the appeal be dismissed as to the widow, because she had no interest in the subject of the litigation; and as to the infants, because their guardian *ad litem* alone had the right to appeal on their behalf.

We are of opinion that the appeal should be dismissed as to the widow, as she, under her husband's will, which she does not appear to have renounced, had no interest in the land involved in this case. The guardian *ad litem* might have taken an appeal in the name of the infants, by himself as such, but if he did not they had the right to do so by some one as their next friend. They were parties to the suit, the owners of the land contracted to be sold, and were prejudiced by the decree from which the appeal was sought, which was an appealable decree, and therefore come clearly within the provisions of section 3454 of the code. See 22 Cyc. 706; 14 Ency. Pl. & Pr., 1058; *Stewart v. Crabbin*, 6 Munf. 280.

The only question involved in this appeal upon the merits is whether or not a court of equity will compel a fiduciary, vested with a discretionary power to sell lands devised to infants when, in his judgment, their interest will be promoted by a sale, to specifically perform an executory agreement entered into by him for its sale, when it appears that such agreement, when entered into, was prejudicial to their interest, and which he refuses to perform.

Where a trust is discretionary, as in this case, a court of equity has no jurisdiction to interfere with its exercise, so long as the trustee acts in good faith, either in exercising or in refusing to exercise the power vested in him. *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60, and cases cited; *Trout &c. v.*



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*Pratt*, 106 Va. 431, 441, 444, 56 S. E. 165, 8 L. R. A. (N. S.) 398.

There is nothing in this case to show that the executor, in making the agreement of sale, was acting in bad faith. The most that can be said is that, in entering into the contract which he thought would promote the interests of the infant owners of the land, he was mistaken, and that, when he discovered his mistake, he refused to specifically perform his agreement.

It is well established that specific performance is not a matter of course—*ex debito justitiae*—but rests entirely in the judicial discretion of the court; not an arbitrary or capricious discretion, dependant upon the mere pleasure of the court, but that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which, at the same time, grants or refuses relief according to the circumstance of each particular case, where those general rules do not furnish any exact measure of justice between the parties. 2 Min. Inst. (1st. ed.) 984; *Bryan v. Loftus, Admr.*, 1 Rob. 12, 16-17; 39 Am. Dec. 242; *Shenandoah Val. R. Co. v. Lewis*, 76 Va. 833; *Fishburne v. Ferguson*, 85 Va. 321, 328, 7 S. E. 361; *Halsey v. Monteiro*, 92 Va. 581, 588, 24 S. E. 258.

In *Thompson v. Jackson*, 3 Rand. 504, 505, 15 Am. Dec. 721, it was said by Judge Carr: "The application to equity is not *ex debito*, but merely presents to the sound discretion of that forum this question: Is it better for the furtherance of justice, considering all the circumstances of the case, to give the party specific execution, or to leave him to his remedy at law?"

If the agreement were for the sale of the executor's own land, made under the circumstances of this case, it is clear, we think, that the furtherance of justice would require its specific execution. But where one of the contracting parties is exercising a power in making sale of another's land, it does not follow that the agreement of sale will be specifically executed in all cases against the beneficiary, where it would have been so

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executed against the party acting for him, if the latter had been selling his own property.

In Pomeroy on Contracts (Specific Performance), sec. 180, it is said: "Contracts whose provisions, if carried into operation, would constitute or require a breach of trust by the party performing, \* \* \* will never be specifically enforced by a court of equity."

In *Mortlock v. Buller*, 10 Vesey 292, Lord Eldon said in discussing the questions involved in that case: "Next, are they (the trustees) bound by their subsequent conduct as if there had been antecedent authority? Clearly they are not. The trustees never had the approbation of the husband and wife. They never can be said to be bound by the drafts settled by the solicitor; and in the very nature of the subject of sale, there were circumstances giving them *locus penitentiae* the moment they were informed there was a question whether the price was reasonable. But, supposing they were bound, that will not help the plaintiff to the relief prayed; for I am clearly of the opinion that their conduct was a breach of trust, not meaning to throw any imputation upon them, as the transaction was very likely to happen; but their duty was not to execute their power of selling, unless they knew a discretion had been wisely and fully exerted upon the point of reasonable price; unless they were satisfied that, upon that point, no reasonable objection could be made with reference to the interests of Mr. Buller, Mrs. Buller or the children who might come into existence. If the court had been called upon in the life of Mrs. Buller for a specific execution, there is so little ground for it under those circumstances, that, on the contrary, at the suit of the *cestui que trust* the trustees would have been restrained from executing. The question as to the interposition of the court between the plaintiff and Mr. Buller would have been different. But it would be impossible to decree a specific performance when, on the very same day, the court might be compelled to say it would be a breach of trust."

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In the case of *White v. Cuddon*, 8 Clark & Fin., H. of L. Rep., 766, where it was held that if there was a substantial misdescription of the property, a court of equity would not enforce specific performance against trustees with compensation, as being prejudicial to the *cestui que trust* and incapable of being ascertained, Lord Campbell, in his opinion, said: "In selling the trust property in such a manner and with such a result, the trustees would certainly be guilty of a breach of trust. The contract cannot, therefore, be specifically enforced against them, and the purchaser ought to be left to an action at law to recover damages from them, adequate to the loss he can show that he has sustained by their breach of contract."

While in the case under consideration the agreement of sale, under the circumstances of the case, would not amount to a breach of trust if carried into effect, still, we do not think it would be in the furtherance of justice to compel the executor to do what, in his discretion, he does not think he ought to do, and what the record shows would be to the prejudice of the infant owners of the land; but the purchaser should be left to his remedy at law against his vendor. Pom. on Contracts. (Spec. Per.), sec. 180.

The decree appealed from must be reversed, and the complainant's bill dismissed, without prejudice to his right to proceed at law.

*Reversed.*

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Opinion.

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**Richmond.****HOOVER v. NEFF AND OTHERS.**

November 21, 1907.

1. **DEEDS—Undue Influence—Burden of Proof—Case in Judgment.**—Undue influence to invalidate a deed or will must be such as to overcome the will and control the judgment of the grantor or testator. The proof must show that the act was procured by coercion, by importunity which could not be resisted, and that the motive was tantamount to force or fear. The burden of proving undue influence is always on him who alleges it. In the case in judgment, the evidence does not sustain the charge.
2. **DEEDS—Undue Influence—Conveyance by Wife to Husband.**—The fact that the grantee in a deed is the husband of the grantor is a circumstance to be considered in determining whether the deed was procured by undue influence, but that fact alone would not justify the annulling of the deed.

Appeal from a decree of the Circuit Court of Rockingham county. Decree for the complainants. Defendant Hoover appeals.

*Reversed.*

The opinion states the case.

*D. O. Dechert*, for the appellant.

*C. R. Wingfield*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

It appears that Emanuel Hoover, appellant, on or about the

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1st day of January, 1903, intermarried with one Virginia C. Will, a widow, who then was and up to the time of her death remained without decendants. Her death occurred on the 16th day of March, 1904, about fifteen months after her marriage, and in the early evening of the day preceding her death she executed a deed conveying to the appellant certain lands of value of about \$1,000, the conveyance being made for the nominal consideration of \$1.00, and the lands conveyed charged with the payment of \$100 to Bessie Will, grantor's niece, when she became twenty years of age, and in the event of the death of Bessie Will before she became twenty years of age, appellant was to retain the \$100 as his own money.

The bill in this cause was filed by a portion of the next of kin and heirs at law of the grantor against the appellant and other parties named as defendants, to have vacated and annulled the said deed, upon the alleged grounds, that at the time of its execution, the grantor was mentally incapable of engaging in the transaction, and that the same was procured by the exercise of undue influence upon her by appellant. Upon a hearing of the cause on the pleadings and the proofs taken for both the complainants and the appellant, the circuit court made its decree, finding that the grantor was entirely capable of executing the conveyance, but that the conveyance was procured by undue influence, and vacated and annulled the same, except as to the charge thereby created upon the lands in favor of Bessie Will, amounting to \$100, as to which the bill itself prayed that the deed be not disturbed. From that decree the appellant obtained this appeal.

The evidence discloses that, at the time of the marriage of appellant with the grantor in said conveyance, she had been for some years a widow, living alone in the country upon the lands in controversy, about a mile from the home of appellant, of whose first wife she was a relative; that her own kindred and heirs at law, or many of them, were of half blood only, and for the most part resided a considerable distance from her; that

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nearly all of her kindred ceased communication with her for some time prior to her intermarriage with appellant, and this situation seems to have existed for many years previous to that marriage certainly during the entire period to which reference is made, her kindred had wholly failed to render her any of those kindly attentions usually expected from relatives to one in her position, and had given her no assistance whatever in the conduct of her affairs. On the other hand, it is shown that appellant had been often, prior to his marriage with the said Virginia C. Will, of material assistance to her, aiding her in the cultivation of her lands, supplying her with fire-wood and other necessities, and during the period of the marriage had completely discharged the duties owing from a husband to a wife, although, for reasons entirely satisfactory to themselves, they continued to reside at their respective homes. The disease which terminated in the death of the wife, was pulmonary tuberculosis, with which she seems to have been affected for a period of two years and possibly somewhat longer, although she was never confined to her bed with it until Monday, the 14th day of March, the third day prior to her death. On that morning, about 7 o'clock, she had what the witnesses describe as a sinking spell, rallying therefrom after about half an hour or an hour and her death did not occur, as before stated, until the night of Wednesday, the 16th of March. It further appears from the testimony of three of the principal witnesses for appellees, that the grantor, at all times after rallying from her sinking spell of Monday morning, was fully aware of her impending dissolution; and that, recognizing her condition on Monday, after the sinking spell, on Tuesday morning and on Wednesday, the day of her death, and at the very moment of the arrival of the scrivener who prepared the deed in question, she was engaged from time to time in stating her desires as to the disposition to be made of sundry articles of her personal property. In fact, counsel for appellees admit that the evidence fails to "indicate any actual mental derangement" in the grantor; the contention

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being that, at the time of the execution of the conveyance, she was in such an extreme and desperate state of weakness as to be "a mere passive instrument in the hands of appellant." In other words, the sole question for our determination is, whether or not this conveyance was obtained by appellant by undue influence. Here we have a capable grantor, as is admitted, and the inquiry is, what undue influence, if any, was brought to bear upon her to cause her to execute the conveyance in question? It may be said, by way of narrowing the issue further, that it is admitted, as well as proven in the record, that at no time prior to the Monday on which her final illness began, which was one day before the conveyance in question was executed, was the grantor's condition mentally or physically such as to admit of the successful exercise of undue pressure upon her, and there is no pretense that, up to that time, any had been attempted. It may be further said in this connection, that the proof shows that the appellant had no opportunity to coerce the grantor in the execution of the deed between Monday morning and the moment of its execution, other than his presence in the room at that moment and for a short while prior. The evidence wholly fails to show that, for a single moment, he was alone with the grantor; on the contrary, it is shown that the only time they were together in the room with the door closed, Susan Hiser, a witness for the appellees, was in the room with them.

It is true, that appellant telephoned to the scrivener about a week or ten days before, that he wished him to come down and do some writing, and, the scrivener failing to come, the appellant, on the evening that the conveyance was executed, sent his son for the scrivener, and appellant met him at the house of the grantor and informed him that the title papers by which he would have to write the deed were down at appellant's house, and the deed was actually written at the latter place. Every one of those who were present when appellant was with the grantor, from the time of her sinking spell on Monday up to the time of the execution of the deed, has been introduced as a

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witness for appellees, and none of them testify that he endeavored in any way to coerce or even persuade her to convey the land to him in contravention of her own untrammelled desire.

We do not deem it necessary to consider at length the argument presented as to the burden of proof in such a case. In any case, whether the instrument sought to be overthrown and annulled, on the ground of undue influence or coercion, be a deed of conveyance or a testamentary disposition of property, the proof must be that the undue influence or coercion was such as to overcome the will and control the judgment of the grantor, in the one case, or the testator, in the other, and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence. *Wallen v. Wallen*, ante, p. 131, 1 Va. App. 351, 57 S. E. 596.

In *Griffin v. Birkhead*, 84 Va. 612, 5 S. E. 685, a wife indirectly (the only mode by which conveyance could have been made at that time) conveyed her separate estate in lands to her husband, and the transaction was attacked upon the ground that the conveyance was procured by undue influence and coercion of the husband, the relation of husband and wife, and the fact that the husband was the implied trustee for the wife's separate estate, being relied on as raising the presumption of undue influence and coercion: *Held*, "There is nothing in the fact that he (the grantee) was the husband of the grantor in the deeds, and that the subject of the grant was her separate estate, for which he was her implied trustee, which constitutes *per se* evidence of imposition, fraud or undue influence; nor is it material or indispensable that there should have been a valuable consideration for the deeds, if, in truth, there was none."

In *Hartman v. Strickler*, 82 Va. 237, supported by a large number of decisions of this court, it was ruled that, in order to invalidate a conveyance on the ground of undue influence or coercion, the proof must show that "the act was procured by



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coercion, by importunity, which could not be resisted, and that the motive was tantamount to force or fear."

A deed containing an entire disposition of the estate of the grantor stands in the nature of a testamentary disposition of his property, especially so when it appears that the grantor himself so regarded it. *Greer v. Greers*, 9 Gratt. 330.

In the case of *Wallen v. Wallen*, *supra*, the opinion by Keith, P., reviews a number of leading authorities bearing upon the subject, and it was there held that the lower court erred in refusing the following instruction: "The court instructs the jury that the influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another; that would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."

In *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928, it is said: "Cases of this kind plainly turn upon the exercise of actual undue influence of the child over the parent, and not upon any presumption of invalidity." In that case *Greer v. Greers*, *supra*, is cited with approval, in which two deeds disposing of grantor's entire estate to one of his sons were attacked on the same grounds alleged in this case, and the proposition that a presumption of undue influence arose out of the relations of the parties to the transactions, was denied.

A number of cases are cited by counsel for appellees in which a deed or will was annulled on the ground of undue influence, but all that need be said of those cases is, that the proof was very different from that in this case.

The circumstances mainly relied on by appellees as showing coercion or undue influence on the part of appellant in the transaction under consideration are, first, that the appellant was the husband of the grantor, and that the deed was prepared

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at his house; second, that the scrivener, in going with appellant's son from his house to that of the grantor, went by a route leading across the fields, through rugged places, etc., instead of by a public road; third, that after their marriage, appellant and his wife continued to reside at their respective homes; and, fourth, that the provisions of the deed are contrary to previous expressions of the grantor's intention.

As to the first, it need only be added to what we have already said, that, while the fact that appellant was the husband of the grantor is a circumstance to be considered in the determination of the question, whether the conveyance was procured by undue influence, that fact alone would not justify the annulling of the conveyance; nor do we attach any importance to the fact, standing alone, that the deed was prepared at appellant's house.

As to the second, the scrivener, J. C. Cooper, and Phillip E. Hoover, who accompanied him, both agree that the only reason why they took the route across the fields, instead of by the public road, was because it was considered nearer, and there is nothing whatever in the record to suggest any other reason why they did so.

With reference to the third ground, viz.: that the appellant and his wife continued to reside at their respective homes: any inference that might be drawn from that circumstance is overcome fully by the proof in the record that the relations between these parties were entirely amicable, and that appellant completely discharged the duties owing from a husband to a wife.

Coming, then, to the fourth ground: While there is some testimony tending to show that the provisions of the deed were contrary to the previous expressions of the grantor's intention, to the effect that she did not intend to "make her property over" to appellant, or that she "would never sign no paper for no man," these declarations were made some time before the execution of the deed, the latter before grantor's marriage with appellant. Frederick Ritchie, a cousin of the grantor, testifies that, about a month before her death, grantor told witness that

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"Mr. Hoover (appellant) treated her all right, and she got along fine now," and that "she was going to see that he (appellant) got everything she had—that she wanted him to have everything she had." This witness and others testify as to the feelings of the grantor towards her next of kin, and her purpose that they should have no part of her estate.

Even if such evidence as that relied on were relevant upon an inquiry as to the substantive fact of undue influence, it is entitled to little or no weight, for it cannot be gathered from the statements as made whether or not the grantor had reference to making over her property during her life or its disposition upon her death. It is much more reasonable to interpret these statements as meaning that the grantor intended to retain control of her own property during her lifetime, than that they had reference to her disposition of it at her death.

In *Stevens v. Vancleve*, 4 Wash. (U. S. C. C.) 262, cited in *Wallen v. Wallen*, *supra*, Mr. Justice Washington states the law as follows: "The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity. If the evidence is offered in support of the instrument, it could only have that effect upon the supposition of a uniform consistency of those declarations, not only with the instrument itself, but with the secret intentions of the party, at all times after those declarations were made; and yet how unsafe a criterion would this be, when most men will acknowledge the frequent changes of their intentions respecting the disposition of their property by will, before they have committed them to writing. The uniform consistency of those declarations is the chief ground upon which the whole argument in favor of the evidence is rested; and yet, if the evidence be admitted at all, the plaintiff would be at full liberty to prove opposing declarations of the testator at other times; and thus a door would open to an inquiry in

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no respect pertinent to the main subject of investigation, but mischievously calculated to perplex and to mislead the jury. That such evidence has sometimes been given, is proved by many of the cases read by the defendant's counsel; but it would be very unsafe to consider those instances as laying down a rule of law, since, in none of them was an objection made to the admission of the evidence, so as to submit its competency to judicial inquiry and decisions. The general rule of law is against the evidence, and no case has been cited showing an exception to it, unless it was offered to repel a charge of fraud or circumvention of the devisee in obtaining the will."

That the execution of the deed was in pursuance of a previous fixed intention of the grantor, is shown, we think clearly by the following testimony:

Cooper, the scrivener, who took the acknowledgment of the grantor, had been several times elected a justice of the peace in his county, and his reputation for truth and veracity is not questioned. He testifies that he first talked with grantor to satisfy himself "whether she was competent to acknowledge a deed or not," and then read the deed over to her, word for word, boundaries and all," and before signing it, she declared that it was exactly the way she wanted it; and that, after signing, she said that she had been very poorly on Monday, but was better on that day (Tuesday), remarking that she was ready to go on Monday if the Lord called her, except for something, which the witness did not catch, but which is supplied by Phillip E. Hoover, who, when she made the remark, was closer to her than Cooper, and who states that, after she remarked that she had been very ill on Monday, she said, "Although I was ready to go, except one thing—now that is fixed, I am ready to go at any time." Mrs. Sidney B. Hoover also states that, on the day of her death, the grantor told witness that she "had everything straightened up now, and was ready to die;" and there is not a circumstance to show that she had reference to anything else that had been straightened up except the execution of the deed.

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Cooper further testifies that, in addition to the grantor being mentally capable of understanding what she was doing, and in the free exercise of her own will and purpose, she gave him some information which clearly explained the location of a part of the land conveyed, with reference to the residue, and correctly stated the sources from which she acquired the title; also discussed intelligently the provision for Bessie Will, etc. Up to the arrival of Cooper she was conversing with appellees' witness, Susan Hiser, and directing the disposition of certain of her personalty. While Cooper noticed the weakness of grantor's voice, it is shown by appellees' evidence that her voice was for some time prior to her last illness, so weak that it was difficult for her to talk at times so as to be understood, while her mind was always clear and unaffected, even up to the last hour of her life.

The undisputed evidence shows that the deed was not executed in any secret manner; on the contrary, the door between the grantor's sick-room, where the deed was executed, and that adjoining it, was left open, and Bessie Will (grantor's niece) and Susan Hiser, both witnesses for appellees, were in the adjoining room, and were not prevented by any one from entering the room, nor even requested to remain outside; and nobody denies that the entire deed, "boundaries and all" was read over by Cooper to the grantor in a loud tone of voice. The fact that the paper was executed at night is fully explained by the fact that the scrivener was a school teacher, living seven or eight miles from grantor's home, and was prevented by his school duties from arriving at an earlier hour. In reply to a question, on cross-examination, as to the instructions given him by appellant, Cooper answered: "He only instructed me this far, he told me that it was Mrs. Hoover's desire to have the deed fixed up in that way, and he furnished me the deeds to write it by, and told me that Mrs. Hoover had said to him to put in the deed in regard to Miss Bessie Will, \$100.00 to be paid to her. Those are the instructions Mr. Hoover gave me."

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Appellees introduced some evidence that, for some time prior to her death, the grantor had not had, except on the Monday preceding it, the attention of a physician, and doubtless the introduction of this evidence was for the purpose that an inference might be drawn from it, that the relations between appellant and his wife were unpleasant and strained, and that, therefore, the provision by her for him in the deed was an unnatural one. That such an inference is not justified appears from the evidence introduced by the appellees themselves in the depositions of three of their chief witnesses. One of them, Dr. Geil, states that he himself, some time prior to the final sickness of the grantor, advised her to have a physician and take such medicines as were appropriate to her disease, but that she declined to do so. Bessie Will, who was, for a considerable portion of the grantor's latter life an inmate of her house, testifies that the grantor positively refused to have a physician or to take any medicine, and that appellant frequently urged her to do so. Ritchie, a witness unfriendly to appellant, testified to the same effect. The last two witnesses named and another testify that the grantor herself told them on several occasions that appellant wanted her to reside with him at his home, but that she, for reasons stated, preferred to remain at her own house.

After his wife's death, appellant interposed no objection to Bessie Will and another, who testify for appellees, taking possession of the articles of personalty which she, during the last two days—in fact, during the last hours—of her life indicated that it was her desire they should have; and without discrediting the honesty and intelligence of these witnesses, it could not be supposed that they would have entertained the idea of receiving such benefactions at the hands of one whose condition was such as to preclude either intelligence or freedom of action in their bestowal. As appellant, sole distributee of these articles, voluntarily released them in accordance with the mere verbal expressions of the desire of his wife to these parties, it strongly militates against appellees' theory that he was animated

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by a desire to appropriate to himself the property of his wife, regardless of her own will and purpose.

In our view of the evidence, it not only shows that the grantor was mentally capable of executing the conveyance in question, but that this capable grantor, in making the conveyance, acted of her own free will, and was actuated by no motive other than her own purpose and design. Therefore, the decree appealed from will be reversed and annulled, and this court will enter the decree that the circuit court should have entered, dismissing appellees' bill with costs to appellant.

*Reversed.*

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Statement.

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**Richmond.**

## KLINE v. MILLER'S ADMINISTRATOR AND OTHERS.

November 21, 1907.

Absent, Cardwell, J.

1. **MERGER**—*Union of Incumbrance and Estate*.—If the holder of an incumbrance subsequently acquires the property upon which it rests, the lien is generally thereby extinguished, but this doctrine has no application where the holder of a vendor's lien upon one tract of land purchases from the owner a wholly different tract on credit, when there is no agreement between them for such an application. In the latter case, the owner of the incumbrance does not become the owner of the land upon which the incumbrance rests, but of an entirely different tract, and there is no such blending of interests as would occasion the merger of the lesser in the greater.
2. **PAYMENTS**—*Application of Parties—Rights of Third Persons*.—The applications of payments made by the parties to a contract cannot, as a rule, be questioned by third persons. The right is one existing strictly between the original parties, and no third person has any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor has required it.

Appeal from a decree of the Circuit Court of Rockingham county. Decree for complainants. Defendant Kline appeals.

*Affirmed.*

The opinion states the case.

*Jno. E. Roller and George G. Grattan*, for the appellant.

*Sipe & Harris*, for the appellees.



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WHITTLE, J., delivered the opinion of the court.

We shall confine our inquiry to the bearing of the decree complained of on the rights of John B. Kline, who is the sole appellant.

The facts relevant to the matter in controversy are as follows: On September 1, 1873, D. B. Kline purchased of C. R. Branner an undivided moiety of two tracts of land, situated in Rockingham county, Virginia, one known as the "Meadow" tract, containing 103 acres, and the other the "Brush" tract, of 107 acres. The purchase price of Branner's interest in the properties was \$3,650, of which sum \$1,650 was paid cash, and for the credit installments the purchaser executed five bonds for \$400 each, payable at 1, 2, 3, 4 and 5 years, secured by a vendor's lien reserved in the deed. One year later, Kline bought of Eliza A. Homan the other half of the two tracts for \$3,919.45, on the same terms as to cash and credit payments, with his father-in-law, Daniel Miller, as surety, and a vendor's lien also reserved on the face of the deed. Kline conveyed this moiety of both tracts in trust to secure the amount of the purchase price to Miller; and, being unable to pay for the "Meadow" tract, on May 10, 1875, he sold and conveyed the entire tract to Miller for \$5,961.67, the terms of sale being \$3,000 cash and the residue in five annual installments of \$529.23 each, secured by vendor's lien on the land.

At that time, this was the status of affairs between the parties: Miller was the holder of the incumbrances on the "Brush" tract, while his purchase money bonds for the "Meadow" tract were in excess of those liens. It will be observed, however, that these bonds were not then due.

On June 21, 1875, Miller paid off for Kline what is known in the record as the "Sites bond" of \$910, and died July 5, 1877, without change in the *status quo* between him and Kline. His son, J. P. Miller, qualified as his administrator, and on January 1, 1878, entered into a written agreement with Kline

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(to which all the Miller heirs were parties) settling the transactions between him and the estate. In that settlement the amount of the "Sites bond" was applied in payment of the deferred installments of purchase money of the "Meadow" tract, the effect of which appropriation was to leave undischarged the vendor's liens on the "Brush" tract, to the extent of the balance ascertained to be due from Kline to Miller's estate. This settlement and application of payments was subsequently ratified and confirmed, and the balance due established as "a lien on the 'Brush' tract," (*at Kline's instance*) by decree of the circuit court of Rockingham county of June 17, 1881, in a suit in equity brought by Kline to administer Daniel Miller's estate. It will, moreover, be observed, that all persons *then in interest* were parties to the agreement, settlement and suit, and that, at that time, no question was raised as to the fairness and propriety of the proceedings and result attained.

The appellant's interest in the subject matter in controversy accrued March 1, 1887, when his brother, D. B. Kline, executed a deed of trust for his benefit on 71½ acres of the "Brush" tract, followed by an absolute conveyance of that property on September 31, 1889.

In 1896, this suit was brought by Miller's administrator against Kline and his alienees, to subject the "Brush" tract to the satisfaction of the amount due on the vendor's liens. The decree appealed from confirmed the finding of the master in chancery to whom the question was referred, that the indebtedness from Kline to Miller's estate constituted a subsisting lien on the "Brush" tract.

The major premise of the appellant presents the narrow question, that the dealings between Kline and Miller, which culminated in the deed of May 10, 1875, conveying the "Meadow" tract from the former to the latter, operated *ipso jure* an extinguishment of the incumbrances on the "Brush" tract. The contention proceeds on the theory, that Miller being the holder of those liens, and his liability on the purchase of the "Meadow"

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tract representing an indebtedness to Kline in excess of the liens, they were, by operation of law, irrespective of the intention of the parties, *eo instanti* discharged. The principle invoked to sustain that proposition is that, when the holder of an incumbrance subsequently acquires the property upon which it rests, the lien is thereby extinguished.

The doctrine is illustrated by the case of *Allen v. Patrick*, 97 Va. 521, 34 S. E. 451, where a husband having purchased his wife's contingent right of dower in his real estate, secured the purchase price, along with other debts, by a deed of trust on the land. On the death of the wife intestate, the husband took the debt as her distributee, and the court held that the debt and lien to secure it were extinguished.

The distinction between that case and this is obvious. Here the owner of the incumbrance was not the owner of the estate, and hence there was no such blending of interests as would occasion the merger of the lesser in the greater. Moreover, there is no evidence in the record of any stipulation between the parties, at the date of the sale of the "Meadow" tract, that the purchase money should be applied in discharge of incumbrances on the other tract; but a contrary intention is plainly to be inferred from the circumstance that the sale, as we have remarked, was not for cash, and the fund which it is said was applied by operation of law in liquidation of the liens, was not available for that purpose because, by express agreement, it was payable at one, two, three, four and five years from that date. The bare statement of the proposition would seem to proclaim its fallacy.

In *Allen v. Patrick*, *supra*, the court also held: "If a court of equity finds it to be to the interest of a mortgagor who has acquired the mortgage that a merger should not occur, it will keep both alive, but the interest must be one. the promotion of which commends itself to a court of conscience. It must be for an innocent purpose, and in order to work a substantial justice." See also *Rorer v. Ferguson*, 96 Va. 411, 31 S. E. 817.

In this case, at the date of the application of what was due

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from Miller's estate on the purchase price of the "Meadow" tract in payment of the "Sites bond," the appellant was a stranger to the transaction, and his rights in no manner affected by it. It was competent, therefore, for Kline to make the application that was made, and in appropriating the payment to the least secured debt, he only did what the law would have done in the absence of action by the parties. *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940.

In *Coles v. Withers*, 33 Gratt. 186; the court (p. 203) observes: "The general rule is subject to but few exceptions, and this is not one of them, that the court cannot go outside of the case, or see how third persons may be affected by the application. In *Gordon v. Hobart*, 2 Story R. 243, Judge Story said, that the right of appropriation of payments was one strictly existing between the original parties, and no third person had any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor had required it."

We are of opinion that, both on principle and authority, the decree, in this aspect of the case, is plainly right.

Subordinate assignments of error were not pressed, and, being without merit, need not be noticed.

For these reasons, the decree must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

LENNIG v. HARRISONBURG LAND & IMPROVEMENT CO. AND  
OTHERS.

November 21, 1907.

1. **EQUITY—Quieting Title—Enforcement of Lien on Part of Tract—Irreparable Injury.**—If the purchaser of a part of a tract of land, who, knowingly, purchased subject to a vendor's lien on the whole tract, can maintain a bill in equity against his vendor and the holder of the lien to compel the enforcement of the lien against the residue of the tract, the bill must make such definite averments of fact as will show imminent danger of irreparable injury if equitable relief is not afforded.
2. **PRINCIPAL AND SURETY—Purchaser of Part of Tract of Land Subject to Vendor's Lien.**—The purchaser of a part of a tract of land which is subject to a vendor's lien, who has purchased with notice of the lien and taken his title subject to it and without covenant against it, but who has paid no part of it, and is in no way personally liable for its payment, is in no sense a surety for the payment of the lien.
3. **QUIETING TITLE—Purchaser of Part of Tract of Land Subject to Lien—Suit to Compel Enforcement of Lien.**—A purchaser in possession under a deed with general warranty, but without any covenant against encumbrances, cannot maintain a bill against his vendor to remove a cloud upon his title created by a vendor's lien on the whole tract, of which that purchased is a part, when there is no averment of the insolvency of his grantor, or of the insufficiency of the residue of the tract to pay the lien.

Appeal from a decree of the Circuit Court of Rockingham county. Decree for defendants. Complainant appeals.

*Affirmed.*

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The opinion states the case.

*Charles G. Herring*, for the appellant.

*Conrad & Conrad*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

The averments of the bill filed in this case by appellant against the Harrisonburg Land and Improvement Company and J. M. Snell, appellees, are, that the appellant is the owner and in the possession of seventeen certain lots of land, situated in the corporate limits of the town of Harrisonburg, in the county of Rockingham, giving the number of each lot, as shown on a recorded plat of the addition known as the Harrisonburg Land and Improvement Company's addition to the town of Harrisonburg; that appellant had purchased, paid for and obtained deed for said lots from the Harrisonburg Land and Improvement Company about fourteen years theretofore, which deeds were made with the covenant of general warranty, and filed as exhibits with the bill; that there is a vendor's lien owing by and due from the said company for a large part of the unpaid purchase price (from three to four thousand dollars) for the lands and lots now owned by said company, or at any time conveyed by the company to appellant and other purchasers; that said vendor's lien, represented by bonds, is now owned by said J. M. Snell, a stockholder in and director of the said company; that appellant's lots are very valuable, and could be sold at a good price, but for the cloud upon the title thereto occasioned by said unpaid vendor's lien; that appellant has been forced to hold his lots for fourteen years, pay taxes thereon, lose the use of his money invested therein, and is now confronted with the equally ruinous alternative of continuing this condition of affairs indefinitely, with the interest on the vendor's lien debt continually increasing, or of sacrificing his

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property at the low prices it would bring with the said cloud upon the title; that the said Harrisonburg Land and Improvement Company still owns a large tract of valuable land and many valuable lots with improvements thereon, and appellant is informed and avers that the lands still owned by the said company are in equity bound for, and will be first subjected and applied to the payment of said vendor's lien; that the said real estate still owned by the said company is ample to pay off and discharge all the liens and incumbrances upon the said property now owned by the said company, if the same is applied thereto at once, but, if the said company continues in the future as in the past to default in the payment of the interest upon the said vendor's lien debt, it will be only a question of time until the property of said company will cease to be adequate to pay off and discharge said vendor's lien debt, and appellant's lots will be taken for same and lost to him.

It is further averred that appellant has patiently waited fourteen years for the said company to pay their debts and clear appellant's title, and that he has a right to resort to a court of equity to have said lien satisfied, and the said cloud removed from his title; the prayer of the bill being that, upon the taking of all proper accounts, a sale of the lands still owned by the Harrisonburg Land and Improvement Company, or so much thereof as may be necessary to pay off and discharge said vendor's lien debt, be ordered, etc.

To the bill the defendants demurred upon several special grounds, stated in writing, in which demurrer the appellant joined; and upon the hearing the circuit court sustained the demurrer and dismissed the bill.

The first ground of demurrer is a mere reiteration of the general demurrer, and of the remaining five it is only necessary for us to consider the second, viz.: "That the allegations of the bill are not sufficient upon which to base the relief sought."

"In order for a person successfully to invoke the interposition of equity to remove a cloud, he must not only establish the

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validity of his own title, but also the invalidity of his opponent's." 6 Am. & Eng. Ency. L. (2nd. ed.) 156, and authorities cited in note. Also Pomeroy's Eq., secs. 724-5.

The authorities cited by appellant in support of the proposition that an unsatisfied mortgage will be decreed a cloud and relief granted, do not sustain the view appellant contends for, but are in accord with the rule established by the weight of authority, that the bill, to be maintained, must be against "one who asserts an adverse title under a mortgage, the validity of which is denied by the plaintiff." *Clouston v. Shearer*, 99 Mass. 209; *Carter v. Taylor*, 3 Head (Tenn.) 30.

It will be observed that the vendor's lien (by decree) is admitted by the bill, and it is not pretended that it is not a valid, subsisting and enforceable lien. Were this valid, enforceable lien, with the knowledge of appellant and subject to which he took title to his lots, such a cloud upon title as equity would relieve, his bill does not aver such imminent danger of irreparable injury as is necessary to authorize a court of equity to grant the relief asked.

"The danger must be more than speculative." *Saunders v. Village of Yonkers*, 63 N. Y. 489; *Torrent v. Booming Co.*, 22 Mich. 354.

The bill nowhere avers (as alleged in the petition for this appeal), that "the complainant is in imminent danger of losing his entire property." On the contrary, it is averred that the Harrisonburg Land and Improvement Company still owns a large tract of valuable lots, with improvements thereon, which lands, still owned by the company, are in equity bound for and will be first subjected and applied to the payment of the vendor's lien; and, in the following paragraph, it is admitted that the real estate owned by the company "is ample to pay off and discharge all the liens and incumbrances upon the company's property if applied thereto at once." The necessity for applying the company's property *at once*, in order to shield appellant's lots from liability to the vendor's lien, is not made to



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appear by any facts stated in the bill, nor is it made to appear that the owner of this vendor's lien (appellee Snell) has been guilty of *mala fides* in not heretofore enforcing it. *Non constat*, but that by litigation or other sufficient cause he has been unable to do so.

It is not pretended that appellant, at any time before the filing of his bill, even requested the owner of this vendor's lien to enforce it, or the lien debtor to pay it, for the protection of appellant, and that the request was denied. Whether, if this has been averred, it would have been sufficient on demurrer to entitle him to maintain his bill in a court of equity, we are not to be understood as expressing any opinion. The averred necessity for the vendor's lien being enforced *at once*, is but the expression of an opinion not founded upon facts stated, and is purely speculative. There is no averment that the land company is not reducing its debt, or that it is defaulting in interest, nor that it, in a short time, will amount to more than the value of land still owned by the company, or first liable before appellant's land could be subjected, the nearest approach to such an averment being, that if the company "continues in the future as in the past" to default in the payment of the interest on the vendor's lien debt, "it will be only a question of time until the property will cease to be adequate to pay off the lien debt." Just how much time would be required to bring about this apprehended injury to appellant is left entirely to conjecture. Such indefinite averments are not sufficient to be construed into an immediate or reasonable apprehension of loss, justifying the intervention of a court of equity.

Much of the argument for appellant is directed to the right of a surety; but it is clear, we think, that the argument and the authorities cited to support it are wholly inapplicable—first, because the averments of the bill do not present that question; and, second, in no view of the facts averred could appellant be regarded as occupying the relation of surety for the payment of the vendor's lien in question. He has paid no part

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of it, and is in no way liable personally for its payment, but is only a purchaser, with notice of the vendor's lien, and took his title subject to it, and without covenant against it. His case, therefore, falls under the control of that class of cases to which belong *Marbury v. Thornton*, 82 Va. 704, 1 S. E. 909; and *Beale v. Seiveley*, 8 Leigh 658.

In the first-named of these cases it is held, that a covenant of warranty can never be treated as a covenant against mere incumbrances. If there has been breach of the warranty, the party injured has adequate remedy at law; but to constitute such breach there must be an eviction, or the plaintiff prevented from taking possession of the premises. Appellant's bill admits that he is in possession, and has not been evicted or disturbed in his possession. Therefore, in order to afford him the relief he seeks, a court of equity would have to treat the covenant of "general warranty" in his deed as a covenant against a mere incumbrance, which would be to make a new contract for him.

After stating the rule as to executory contracts, Professor Lile, in his Notes to Merwin's Equity, sec. 740, says: "The rule, however, is wholly different in the case of an executed contract—that is, a conveyance of real estate. Here, as a general rule, the vendee who has taken a conveyance, must rely upon the covenants of title in the deed, and if there be none, he purchases at his peril, in the absence of bad faith on the part of the vendor."

And in Merwin's Equity, sec. 429, it is said: "When the parties have made a definite contract, equity will not relieve against its consequences, because it has become less profitable or more onerous on account of some contingency against which the contract did not provide. A court of equity cannot make a new contract for the parties."

That appellant is not, upon the averments of his bill, entitled to the intervention of a court of equity, is very clearly and conclusively shown by the well considered opinion by Tucker, J., in *Beale v. Seiveley*, *supra*, in which he says: "He (vendor)

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may, therefore, be willing to give a general warranty, which cannot be enforced until eviction, but not a covenant for good title, which he may not have. Where he enters into a general warranty without other covenants, he makes himself only responsible for eviction and secures to himself the advantage of every doubt which hung over his title being removed by lapse of time. In these cases, therefore, the vendee is confined to the covenant of general warranty. He has chosen, or at least agreed upon, his remedy, and to that remedy he must be tied down. However bad his title, he cannot sue upon his warranty unless he be evicted; and if he cannot do so at law, upon what principle can equity make the vendor liable beyond the terms of his contract? How can equity make him responsible farther? \* \* \* It cannot do so without making a new contract for the parties, or interpolating a new and substantive principle into that already made. \* \* \* I am aware of no case in which the rights of the party have been extended in equity beyond his covenants. \* \* \* But, after a deed has been made and accepted, though our courts have given relief *in anticipation* of an eviction which is impending, accompanied by the danger of insolvency, they have never gone one jot beyond the covenants, except where the fraud of the vendor gives rise to a distinct cause of action, independent of the covenants."

Conceding, as counsel for appellant contends, that the object of the suit in that case was to avoid paying the grantor what grantee had contracted to pay, and that the opinion says: "If plaintiff had averred that defendant was insolvent or in failing circumstances, he would have had the right to maintain his bill," this does not help appellant's case, since there are no such averments in his bill. Instead of alleging the insolvency of the vendor's lien debtor, the averment is made, as already stated, "that the real estate owned by the company is ample to pay off and discharge all the liens and incumbrances upon the company's property," etc. Nothing whatever is said as to whether or not the company has other property than that covered by the

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vendor's lien held by appellee Snell, or that it owes other debts.

As to the company being "in failing circumstances," beyond the vague and indefinite averment, already adverted to, that if the company "continued in the future as in the past to default in the payment of the interest upon the said vendor's lien debt, it will be only a question of time until the property of said company will cease to be adequate to pay off and discharge said vendor's lien," etc., the bill is silent.

We are of opinion that the decree appealed from is without error, and, therefore, it is affirmed.

*Affirmed.*

**Richmond.****LURTY'S CURATOR v. LURTY.**

November 21, 1907.

Absent, Keith, P., and Cardwell, J.

1. **LIMITATION OF ACTIONS—*New Promise—Acknowledgment—Evidence—Burden of Proof—Survivor of a Transaction.***—Where a husband sells personal property owned by himself and wife jointly, and takes the note of R., the purchaser, therefor, payable to himself, and then renders her a statement in writing over his signature, showing that her share of the sale amounted to a sum stated, "which is due you out of R.'s note when collected," this establishes the fact that the husband was the wife's agent in the transaction, and the language used is an acknowledgment that he will be due his wife the sum stated when the note is paid, from which the law implies a promise to pay. The burden is on the wife to show the subsequent payment of the note and the date of payment, and this may be shown by the maker of the note, notwithstanding the death of the husband, in an action by her against the curator of her husband's estate. The limitation on such acknowledgment is five years, as it is "a contract by writing, signed by the party to be charged thereby."
2. **LIMITATION OF ACTIONS—*Acknowledgment Under Seal.***—The three-year limitation is inapplicable to a debt evidenced by writing under the signature and seal of the debtor. If the antecedent debt were a mere assumpsit, it is merged in the specialty.
3. **EVIDENCE—*Effect of Acceptance of a Check "In Full Of All Demands."***—The acceptance of a check containing the words "in full of all demands," raises a *prima facie* presumption that it is in full payment and discharge of all previously existing liabilities, and the burden of overcoming this presumption by direct or circumstantial evidence rests upon the payee.
4. **WITNESSES—*Husband and Wife—Privileged Communications—Matters of Business.***—Under the statute of this state, neither husband nor

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wife can, without the consent of the other, testify (either during the coverture or afterwards) as to any communication made by one to the other while married, but this rule of privilege does not apply to communications between husband and wife with regard to a business matter in which he is acting as her agent.

Error to a judgment of the Circuit Court of Rockingham county in a proceeding by motion for a judgment. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*H. W. Bertram* and *D. O. Dechert*, for the plaintiff in error.

*Conrad & Conrad*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The judgment under review was recovered on motion by the defendant in error, Annie S. Lurty, against the curator of the estate of her deceased husband, Warren S. Lurty.

Five hundred and five dollars and eighty-nine cents of the recovery is the plaintiff's share of the price of cattle, the joint property of the husband and wife, sold by the former to Rodeffer, who made his note to the husband for the amount of the sale. This note was afterwards collected by the husband, who, before collection, rendered an account in writing to the plaintiff, over his signature, showing that her share of the sale amounted to \$505.89, "which is due you out of Rodeffer note bearing 6 per cent. interest from October 18, 1901, at 120 days, bal. of the note, when collected, is W. S. Lurty's."

We are of opinion that this transaction establishes the relation of principal and agent between the plaintiff and her husband, with respect to the sale of the cattle, and the language employed by him was an acknowledgment that, when the note

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was collected, he would be due his principal the sum indicated, from which the law implies a promise to pay.

The case is not distinguishable in principle from the class of which *Cunningham v. Herndon*, 2 Call 530, *Murdock v. Herndon*, 4 H. & M. 200, *Newby v. Forsyth*, 3 Gratt. 308, and *Davis v. Mead*, 13 Gratt. 118, are types.

The facts in *Davis v. Mead*, *supra*, are as follows: "A paper contains a statement of account of rents collected through a number of years by an agent for his principal, and, at the foot of the account there is a written statement, setting out the gross amount of the rents received, certain deductions for commissions and expenses, leaving the net sum of one thousand, one hundred and thirty-seven dollars, and thirty-five cents, and it concludes: 'In the foregoing statement all errors to be corrected. As witness my hand and seal.' And it is signed and sealed by the agent." In that case, Judge Lee observes: "To constitute a good and valid obligation, the law does not require any particular set form of words to be employed. Any words which sufficiently declare the intention of the party and denote his being bound, or which expressly or impliedly acknowledge a debt as due from him to another, will constitute a good bond. \* \* \* It was, therefore, an acknowledgment, under his seal, that so much was still due \* \* \* to pay which a promise is raised by implication of law."

It is clear, under the authorities, that the paper in question constitutes "a contract by writing, signed by the party to be charged thereby," the limitation on which is fixed at five years by Virginia Code, 1904, section 2920. The plea setting up the three-years' limitation was, therefore, properly overruled.

*A fortiori*, the three-years' limitation, was inapplicable to the item of \$102, evidenced by writing under seal, which constituted another part of the judgment. We fail to appreciate the force of the argument that the antecedent indebtedness, upon which the writings in question are founded, were mere assumpsits, which ought to regulate the period of limitation. The

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contention loses sight of the doctrine of merger, whereby, by operation of law, an inferior liability is absorbed by one of higher legal degree.

The exception to the admission of the testimony of Rodeffer and the instruction given by the trial court as to the effect of the check drawn by the husband payable to the wife, purporting to be "in full of all demands," are both without merit. Rodeffer's evidence was admissible to show that he had paid the note, and to fix the date of payment. The implied promise of Lurty to pay was conditioned upon his collecting the note, and the burden of proof rested upon the plaintiff to establish that fact.

The instruction complained of tells the jury that if they believe from the evidence that the plaintiff \* \* \* accepted and collected the check \* \* \* bearing upon its face the statement that the same was 'in full of all demands,' such acceptance and collection \* \* \* raises a *prima facie* presumption that the same was in full payment and discharge of all previously existing liabilities, \* \* \* and the burden of overcoming such presumption by direct or circumstantial evidence \* \* \* rests upon the plaintiff, and unless such presumption is overcome by a preponderance of the evidence, they must find for the defendant." This instruction propounds a familiar and correct proposition of law, and was relevant to the issues and evidence in the case.

The remaining assignment of error demanding notice arises in connection with the court's action in excluding certain letters written by the wife to the husband, which, it is alleged, have material bearing upon the matters in controversy.

Admittedly, the exclusion of these letters would be proper according to the common law doctrine, but it is said their admissibility follows as a necessary consequence to the statutory right of husband and wife to contract with and implead one another. But this argument is more plausible than sound. It would have been equally applicable to the common law rule of



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exclusion of witnesses in civil cases, on the ground of interest or of being parties—a rule which obtained in this state until abolished by statute.

Professor Minor, in discussing the well-settled rule of the common law, rendering husband and wife incompetent, observes: that it is “a rule of exclusion founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society; for it is essential to the happiness of social life that the confidence which ought to exist between husband and wife should be sacredly cherished in its most unlimited extent, not only during the continuance of the coverture, but as to facts learned from the consort even after its termination also.” 4 Min. Inst. (Pt. I,) 690.

In the revision of 1887, the revisors strongly recommended the entire repeal of the common law rule in all civil cases, and a modification of it in criminal cases, but the code committee opposed the innovation and struck out the suggested changes. After the code had been adopted, a bill embodying the views of the revisors was again introduced, but met with the same fate. Subsequently, two of the revisors, Judges Burks and Riely, pressed the matter with great force in addresses delivered before the Virginia State Bar Association, but without avail. See note by the editor, Judge Burks, to *Pillow v. S. W. Va. Imp. Co.*, 1 Va. L. Reg. 673; also 3 Va. L. Reg. 410.

The statute law on this subject is found in Va. Code, 1904, sec. 3346a. Though the common law rule has been greatly enlarged, sub-section (3) distinctly prohibits husband or wife, without the consent of the other, being “examined in any case as to any communication made by the one to the other while married, nor shall either of them be permitted, without such consent, to reveal in testimony after the marriage relation ceases, any such communication made while the marriage subsisted; provided, that this exclusion shall not apply to a criminal proceeding for a criminal offense committed by one against

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the other, but as to such proceeding the existing rules of evidence shall remain unchanged."

We are disposed to think that the excluded letters fall within the intendment of the statute; but, however that may be, the common law inhibition must remain intact until removed by legislative and not judicial repeal.

The contention that the letters are admissible by authority of *Bailey v. Bailey*, 21 Gratt. 43, *Carr v. Carr*, 22 Gratt. 168, and *Latham v. Latham*, 30 Gratt. 325, finds ready answer in the fact that these were suits for divorce, of which class of cases Professor Minor remarks: "Neither the common law ruling nor the statutory enactment (Virginia Code, 1904, sec. 2260) excludes proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded wholly upon such admissions." 1 Min. Inst. (3rd ed.) 297.

These letters were written with becoming moderation, dignity and delicacy by a deeply wronged wife to an erring husband, touching the unhappy cause of estrangement between them. They are, therefore, clearly within the privileged class, and ought not, in our opinion, to be subjected to public scrutiny.

The point is not well taken, that this ruling would likewise exclude the communication from the husband to the wife with relation to the cattle transaction. If, in any proper sense, such statement of liability could be regarded as privileged, it comes within the exception "that the rule of privilege does not apply to communications between husband and wife with regard to a business matter, in which he is acting as her agent." *Schmied v. Frank*, 86 Ind. 250; *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72; *Com'th v. Sapp*, 29 Am. St. Rep. 420, note.

There is ample evidence in the record to sustain the verdict of the jury; and, upon the whole case, we are of opinion that the judgment ought to be affirmed.

*Affirmed.*

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**Richmond.****McCORMICK v. ELSEA AND OTHERS.**

November 21, 1907.

Absent, Cardwell, J.

1. COUNSEL FEES—*Allowance out of Fund—When to be Refused.*—Except in rare instances, the power of the court to require one party to contribute to the fees of the counsel of another party, must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures to the common benefit of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose fund is sought to be charged, are antagonistic to the party for whose benefit the suit is prosecuted. The case in judgment belongs to the latter class, and fees were properly refused.

Appeal from a decree of the Circuit Court of Clarke county. Application for the allowance of counsel fees to be paid out of a fund under the control of court. Application refused.

*Affirmed.*

The opinion states the case.

*F. B. Whiting*, for the appellant.

*A Moore, Jr.*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This controversy arose out of a suit in equity brought by

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Mary E. Smallwood (one of nine distributees of the estate of her mother, Letitia Elsea, deceased) and her daughter, Lillian Smallwood, against the administrator and remaining distributees.

The objects of the suit will appear from the material allegations of the bill, which are as follows: That Albert Elsea died intestate in August, 1903, survived by his widow, Letitia Elsea, and eight children, and a granddaughter, the child of a deceased son; that the decedent left a valuable estate, real and personal, and that W. W. Smallwood, the husband of Mary E. Smallwood, qualified as his administrator; that shortly after his death, W. W. Smallwood, in his own right and as administrator, and the plaintiff, Mary E. Smallwood, brought suit against his widow and distributees for the purpose of administering his estate; that the widow died testate about one month after her husband, survived by the distributees above mentioned; that by her will the testatrix devised a tract of land and bequeathed her entire personal estate to the plaintiff, Mary E. Smallwood, for life, with remainder to her co-plaintiff, Lillian Smallwood, in fee; that this real estate had been conveyed to Albert Elsea in trust for his wife, and that, after the execution of the will, the trustee sold the land, his wife uniting in the conveyance to the purchaser, and deposited the purchase money in bank to his individual credit; that this fund, together with the one-third interest of the wife in the personal estate of her late husband, constituted her estate and passed to the plaintiffs by the provisions of her will; that the administrator of Letitia Elsea had already asserted claim to the purchase price of the land, as a debt against the estate of the husband; and that the will had been lost or mislaid, or abstracted, and could not be produced. The bill concludes with the prayer that the two cases be heard together and the will established; that if necessary, a jury be impaneled for that purpose; and that the estate of the testatrix be administered in accordance with its terms.

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The defendants resisted these contentions, and, upon issues made, the jury found that Letitia Elsea had executed a will, by the stipulations of which the land in question was devised to the plaintiffs, as alleged in the bill, but it appeared that no other portion of testatrix's estate was included in the will, and that the devise was revoked by the action of the testatrix in subsequently disposing of the land.

Thereupon, the appellant preferred a demand against the distributees of Letitia Elsea for \$861.54 (being 20 *per cent.* of the assets of the estate) for professional services in prosecuting the suit to set up the will.

The commissioner in chancery, to whom the matter was referred, allowed the claim; but this finding, upon exception, was overruled by the court. The court, however, awarded a fee to appellant of \$150 out of the assets, for services to W. W. Smallwood as administrator of Letitia Elsea.

It, moreover, appears that the appellant had entered into a contract with the plaintiff, Mary E. Smallwood, on behalf of herself and daughter, for a contingent fee of 25 *per cent.* of whatever might be realized by them under the will of Letitia Elsea. But the fee, which is the subject of this controversy, is founded upon an agreement with W. W. Smallwood, who had qualified as executor, and in that capacity had also retained the appellant to prosecute the suit to establish the will.

As we have observed, the contention of the plaintiffs that the will bestowed upon them the whole of the testatrix's estate, was strenuously and successfully resisted by eight of the nine distributees, and no part of the estate passed by that instrument. Nevertheless, if the insistence of the appellant were to prevail, the anomalous result would follow that, as fruits of their victory, the appellees would be compelled to contribute one-fifth of their patrimony in compensation to counsel for services in a suit, the purpose of which was to deprive them of all interest in their mother's estate. The simple statement of the proposition vindicates the action of the court in rejecting the demand.

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Opinion.

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Except in rare instances, the power of a court to require one party to contribute to the fees of the counsel of another party, must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures to the common benefit of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose fund is sought to be charged are antagonistic to the party for whose benefit the suit is prosecuted.

The rule is thus stated in 4 Cyc. 1013, 1014: "While there is, strictly speaking, no lien on any fund which is within the custody or control of the court, the court may award attorney's fees out of the fund. Thus, counsel for a representative may receive remuneration out of the estate, especially if he procures property for the estate; but counsel for a beneficiary cannot claim payment out of the estate, though he may be paid out of his client's share or from the portions of those beneficiaries who have joined in the proceedings, or have acquiesced in the attorney's exertions." See also *Roller v. Paul*, 106 Va. 214, 219, 55 S. E. 558.

In this case, the appellant, who is admittedly a lawyer of high character, relies wholly on his contract with the executor of Letitia Elsea, apparently overlooking the effect on his contention of the material circumstances adverted to, namely, that no assets came into the hands of his client, or under his control by virtue of his office of executor, and that the interests of his clients were opposed to those of the appellees, from whom he seeks compensation.

We are of opinion that the decree of the circuit court is plainly right, and it must be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.****MILLER & Co. v. SIMPSON.**

November 21, 1907.

1. **PARTNERSHIP—*What Constitutes.***—A mere participation in profits does not always constitute the participant a partner, but if parties have a community of interest in the profits as such, if they agree that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, this makes them partners. It is not essential that the parties shall, by agreements be bound to share the losses.
2. **PARTNERSHIP—*Liability for Losses.***—If an agreement be entered into between two or more persons to form a partnership, each partner is entitled to share in the profits, and will also have to share in the losses without any provision to the latter effect in the agreement, as the law will impose that burden.

Appeal from a decree of the Corporation Court of the city of Staunton. Decree for complainant. Defendant appeals.

*Affirmed.*

The opinion states the case.

*J. M. Perry*, for the appellant.

*Quarles & Pilson*, for the appellee.

CARDWELL, J., delivered the opinion of the court.

In the year 1901, H. Clay Miller, appellant, entered into a

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partnership with one Bradley for the establishment and conduct of a retail dry goods business in the city of Staunton, Miller contributing the capital to conduct the business, and Bradley his labor and services. In the same store they had a "ready-to-wear" department from the inception of their business, and the business proved successful. In the fall of 1903, Miller bought out Bradley's interest in the entire business, and thereafter conducted it, including the "ready-to-wear" department, under the style of H. Clay Miller & Co., and this business also proved successful.

During the fall months, viz.: September, October, November and December, of the years 1901 and 1902, Miller and Bradley employed appellee, Mrs. Cornelia J. Simpson, an expert dress-maker, at a salary of \$12 per week, placing her in charge of the "ready-to-wear" department; and during the corresponding months of the year 1903 Miller and Bradley, and then H. Clay Miller & Co., employed her in the same capacity at a salary of \$15 per week. She was not employed, either by Miller & Bradley or H. Clay Miller & Co., except during the four months named, when the "season" was on. During her employment, first with Miller & Bradley, and then with H. Clay Miller & Co., appellee became fully acquainted with the details of the business of the "ready-to-wear" department, knew the cost and selling prices of all goods handled, and the daily sales thereof, and, in this way, was fully acquainted with the profits of the department.

According to Miller's own testimony, appellee was unwilling to come back to the store for the season of 1904 for employment for only four months, and some new arrangement between the parties was, therefore, necessary if they were to remain together. Looking to have appellee remain with him in business, appellant entered into negotiations with her during the summer of 1904, which resulted in her agreeing to continue with him in charge of the "ready-to-wear" department; and, on the 12th of September, 1904, their contract was reduced to writing, though



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it appears not to have been signed by the parties until September 21, 1904. This contract is as follows:

"1st. It is hereby mutually agreed between H. Clay Miller, party of the first part, and Mrs. C. J. Simpson, party of the second part, witnesseth:

"2nd. That, in consideration for the sum of \$1,000.00 paid by party of the second part to party of the first part, of which this agreement is receipt in full, party of the second part shall share and share alike in the profits of the ready-to-wear department of the business in Staunton, Va., of H. Clay Miller & Co., said ready-to-wear department consisting of suits, cloaks, separate jackets and skirts, and shirt waists, if deemed advisable by both parties to add these last garments to the department.

"3rd. That party of the second part agrees to furnish to the department her undivided time and attention, and to pay all expenses of alterations in garments incurred by the department.

4th. That all expenses of the department, such as express, freight, etc., shall be charged to the department separately, and that an accurate account of sales, purchases and expenses shall be kept of this department.

"5th. That party of the first part shall furnish store-room and the use of his clerks to sell the goods in this department, and shall furnish like amount of capital for running said department, \$1,000.00, of which the stock on hand at September 1st shall be considered a part as mutually agreed, in value.

"6th. That at the 1st of each January stock shall be taken in department and profits determined.

"7th. That during the year, party of the second part shall have a drawing account from the department, not to exceed \$15 a week, and same to be charged to her account.

"8th. That after profits are determined, the account of party of the first part shall be credited with the amounts drawn by party of the second part, and the amounts used to defray the

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expenses of alterations, all other expenses being borne jointly.

"9th. That, if, after the above has been done, there shall be profits undivided, the amount shall be equally credited to the accounts of both parties, to be further used in the business.

"That if ever the department proves unsuccessful, and it is agreed to abolish same, the stock on hand shall be sold and equal division made. Witness the seals this ..... day of September, 1904.

“(SEAL) H. CLAY MILLER & CO.

“(SEAL) CORNELIA J. SIMPSON.”

That appellee paid to appellant the \$1,000.00 stipulated for in the contract is conceded, and for the reason that it was agreed between the parties that appellant was to handle the finances of the business to be conducted, pay all bills, etc.

This “ready-to-wear” department, in charge of appellee, was conducted with success until the summer of 1906, when, for reasons satisfactory to her, and after a correspondence with appellant, it was terminated, and she sought to have an accounting from appellant as to the assets, etc., of the business, contending that it was a partnership, in which she had contributed a part of the capital and appellant the residue; while appellant took the ground that the \$1,000 paid him by appellee was for a share in the profits of the business only, and that no partnership ever existed between him and appellee. Whereupon, appellee filed her bill in this cause, making the contention above mentioned, and praying that an account be taken of the assets of the partnership, and of all its dealings and transactions, from the commencement thereof, and that all other things be done necessary to wind up and finally settle the affairs of said partnership in accordance with the respective rights and interests therein of herself and the appellant.

Appellant answered the bill, making the contention as stated, that no partnership ever existed between him and appellee, other than a partnership in the profits of his “ready-to-wear”

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department; that the only money wherein appellee was in any wise interested which he had at any time in his possession, was the profits of his "ready-to-wear" department, from which appellee had drawn largely; and that, on any settlement of the affairs of the said partnership in profits, appellee would be found largely indebted to him, etc.

Upon the bill, the answer, a general replication to the answer, and depositions taken and filed, both for appellant and appellee, each having testified in their own behalf, the corporation court, without passing upon the question as to when the partnership between appellant and appellee was formed, or when they commenced business, made its decree, of which appellant complains, holding that, according to the true construction of the contract between the parties, bearing date September 12, 1904, a partnership was created and existed between them; that, according to a true construction of the contract, and especially the second, fifth and ninth clauses thereof, considered together, appellee was required to contribute the sum of \$1,000.00 towards the conduct of the partnership business, and the sum of \$1,000 paid by her to appellant, as shown by the contract, was a payment of her share of the capital of said partnership. It was further adjudged, ordered and decreed, that the cause be referred to a master commissioner, who should take, state and settle necessary and proper accounts, to the end that the partnership affairs be finally wound up and settled.

The simple question presented is: Does the contract of September 12, 1904, create a partnership, or is it simply the written evidence of the sale and purchase of a one-half interest in the profits of an already established and going business?

It appears from the proof in the cause that appellant regarded the arrangement between him and appellee as a partnership, and so spoke of it; the correspondence between the parties in an attempted settlement out of court proceeded upon that idea; and all the facts and circumstances surrounding these parties prior to and after the contract was entered into, if more

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than a reading of the contract as a whole were needed, leave no doubt that it established a partnership, and that both parties to the contract so understood it. Not that appellee was merely a partner in the profits of the business, but a partner who had contributed to the capital employed therein, and was also to contribute her services, etc., and be entitled to share in the profits of the business, and liable, as well as appellant, for losses, if any.

It is only necessary, we think, to consider some of the uncontroverted facts and circumstances which are of vital importance, to show that this is the fair and equitable construction of this contract. In the first place, appellant had, theretofore, only run his "ready-to-wear" department about four months in any one year, and it could not, therefore, be considered an established business; while the contract provided for the conduct of the business all the year round—an undertaking new not only to appellee, but to appellant.

The question naturally arises, Why should appellee have been willing to pay \$1,000 for the privilege of sharing in the profits of this undertaking, when she could not know what the profits would be, if any, and when a partnership in the profits only might, by the death of either party or other cause, be terminated the next day, or, if still later, before any profits were made, whereby in either event, she would have paid appellant her \$1,000 and could get back no part of it? According to appellant's view, appellee borrowed the money and put a deed of trust on her property, in order to pay him \$1,000 for the privilege of sharing equally with him the profits of a business conducted on a capital of \$1,000 only, of which \$588.95 was old stock. Appellee had been successful in her calling, and had accumulated some property; and it is unreasonable to suppose for one moment that she, or any one else with any sort of business capacity, would have agreed to enter into a business arrangement so uninviting. On the other hand, appellee's version of the transaction is entirely reasonable, viz.: that she agreed

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to contribute \$1,000 to the capital to be employed in the undertaking, also her time and services, and bear herself "the expense of altering garments;" while appellant was to furnish a like amount of capital, the store-room in which the business was to be conducted, "the use of his clerks to sell the goods," all other expenses to be borne jointly, and the profits of the business were to be shared equally by both. If appellee was only purchasing the right to share equally with appellant the profits of his "ready-to-wear" department, why the provision in the contract that he should "furnish a like amount of capital for running said department?" And for what reason was the second paragraph of clause 9 inserted, viz.: "That if ever the department proves unsuccessful, and it is agreed to abolish the same, the stock on hand shall be sold and equal division made?" If the parties were not to contribute an equal amount of capital, it is inconceivable that appellant would have inserted in the contract (written by himself) a provision for a sale of the stock on hand, and equal division on dissolution, as the capital went to the purchase of the stock, and an equal division would embrace a division of the capital, profits and all other assets of the partnership. He admits in his answer that stock on hand represented "not only cash capital advanced by defendant (appellant), but accrued and undivided profits." Clearly appellee would not be entitled to a division of the proceeds arising from the stock on hand at dissolution, if she was only admitted as a partner in profits. It was agreed "that at the first of each January, stock shall be taken in the department and profits determined," and if appellee only purchased an interest in profits and was not to furnish a part of the capital to run the business, it is again inconceivable that, when such an accounting was had, and it was found that there were profits undivided, such undivided profits were to be "equally credited to the accounts of both parties, to be further used in the business."

The theory of appellant as to what was intended and understood between him and appellee, when they entered into their

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agreement and after, is wholly inconsistent with the provisions of their written contract.

In order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business, engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. *Jones v. Murphy*, 93 Va. 214, 24 S. E. 825, and authorities there cited.

It is not essential to constitute a partnership that the parties are by agreement to share in the losses of the business. It is sufficient if they are to have a community of interest in the profits as such, and where a party to the agreement is entitled to an interest in the profits, this will entitle him to an account to ascertain the result of the enterprise. *Cothran v. Marmaduke & Brown*, 60 Tex. 370, cited in *Jones v. Murphy*, *supra*.

It has been repeatedly held that, where the parties entered into an agreement by which the one was to furnish the capital and the other his services, the profits to be divided between them, and no special contract was made as to the losses, this constituted a partnership, and a court of equity was a proper court for either party to apply to for a settlement of the partnership accounts. *Lengle v. Smith*, 48 Mo. 276.

Here, appellee furnished \$1,000 of the capital, her services, and paid the "expenses of altering garments," and appellant the residue of the capital employed in the business, the store-room, and paid the hire of the clerks, who sold the goods, "all other expenses being borne equally;" the undivided profits on the 1st of January of each year, during the continuance of the business, remained for further use in the business, and the parties became equal owners in the resulting profits.

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It is true that a mere participation in profits does not always constitute the participant a partner; but the principles of the law of partnership lead to the conclusion that, if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner in the resulting profits, while they are undivided and remain as profits, the two are partners, the general rule being, that to constitute a partnership, there must be a community of interests *inter sese*, and that the parties should share the profits and losses. *Jackson v. Haynie*, 106 Va. 365, 56 S. E. 148.

Had not the 8th clause of the contract before us been inserted, it would not have affected the residue of the contract, for the reason that, if an agreement be entered into by two or more parties constituting a partnership, each partner would be entitled to share in the profits, and would have also to share the losses in the business, without a provision to that effect in the agreement, as the law would impose that burden upon him. Were such a provision in the agreement necessary to constitute a partnership, the 8th clause of the contract in this case was clearly sufficient to hold appellee liable for losses, if any, in the business to be conducted under the contract.

We are of opinion that any other construction of this contract than that put upon it by the learned judge of the corporation court would be inconsistent with its terms; and that the construction contended for by appellant would be unfair, unjust and inequitable. The decree complained of is, therefore, without error, and must be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.****MERRYMAN AND OTHERS v. HOOVER.**

November 21, 1907.

Absent, Cardwell, J.

1. **EJECTMENT—Burden of Proof—Title at Commencement of Action.**—A plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness of that of his adversary, and this title must exist in the plaintiff at the time of the commencement of his action. It cannot be acquired afterwards.
2. **EJECTMENT—Outstanding Legal Title—Subsequent Purchase.**—An outstanding legal title in another than the plaintiff, at the time of the institution of an action of ejectment, breaks in upon and disrupts the plaintiff's paper title and bars his recovery. Nor can the plaintiff make good the defect by the subsequent purchase of such outstanding title.
3. **EJECTMENT—Limitation of Actions—Disability of Tenant in Common.**—The disability of one tenant in common will not prevent the statute of limitations from running against other tenants in common not laboring under any disability.
4. **INSTRUCTIONS—Jury Sufficiently Instructed.**—The refusal of an instruction, even though it correctly propounds the law, is not ground for reversal of a judgment if other instructions given upon the same subject correctly propound the law, and are sufficient to enable the jury to apply the facts correctly.
5. **ADVERSE POSSESSION—Land lying in two States—Forfeiture of Part.**—The forfeiture of part of a tract of land lying in West Virginia, under the laws of that state, cannot affect a tenant's claim by adverse possession to the residue of the tract lying in this state.
6. **EJECTMENT—Outstanding Legal Title in State.**—A defendant in ejectment may rely upon an outstanding legal title in the commonwealth at the time of the institution of the action, and thereby defeat the plaintiff.



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Statement.

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Error to a judgment of the Circuit Court of Rockingham county in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

After the evidence had been introduced, the plaintiffs asked for the eight instructions, copied below. The court gave Nos. 1, 2 and 3 as asked, modified No. 4 by striking out the words in italics, and refused *in toto* Nos. 5, 6, 7, and 8. To the action of the court in modifying No. 4, and in rejecting Nos. 5, 6, 7 and 8, the plaintiffs excepted. The instructions, as asked, are as follows:

"1. The court instructs the jury that if they believe from the evidence that the plaintiffs have shown a sufficient paper title to Chambers and Clopper survey, claimed by them, including the tracts of land in controversy in this cause, and claimed by the defendant as follows, to-wit: The Keister tract of 117 acres, the Camphor tracts of 12½ acres, 50 acres and 59 acres, and the Dyer tract of 72 acres, or either of them, or any part of them, then they must find for the plaintiffs, unless they believe from the evidence that the defendant has shown that he, or those under whom he claims have shown that the Dyer tract, or part thereof, is within one of the reservations in the patent, in which event they shall find for the defendant as to said tract, or such part of said tract as they may find to be within the reservation; and as to the other tracts prior to the institution of this suit, held for fifteen years actual, continuous, visible, exclusive and adverse possession of the said tracts of land, or either of them, in the manner defined and limited by the other instructions to be taken and read in connection with this instruction, in which event they must find for the defendant; but that, in order to constitute such adverse possession, sufficient in law, there must be an actual occupation of the same, or else the use and enjoyment of the same by such open, notorious and habitual acts of

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ownership as would be equivalent to actual occupation, and that such adverse possession must be by residence, inclosure, cultivation, or by acts of use and enjoyment aforesaid, accompanied by such change in the character of the land as would convert the same from wild lands into improved lands suitable for the purpose to which it is adapted, or by other acts as aforesaid, which are equivalent to such residence, or inclosure, or cultivation.

"2. The court further instructs the jury that if they believe from the evidence that part of the fence claimed by the defendant to have inclosed the tract known as the Keister tract in controversy in this case, extends beyond the lines of the plaintiffs to an adjoining tract owned by others, or owned by the defendant himself, and that the tract of land in controversy, known as the Keister tract, is not inclosed without embracing other lands outside of its limits, by a fence located some distance from the premises claimed by the defendant, to which the plaintiffs have no claim of title, or if they find from the evidence that said fence is on the lands of the plaintiffs in part and included land to which the defendant disclaims title, then such inclosure alone is not sufficient to constitute actual, exclusive, continuous visible and adverse possession of said tract, and if they further believe from the evidence that this is the only evidence of adverse possession under which the defendant can sustain his defense of adverse possession, they must find for the plaintiffs as to the same.

"3. The court further instructs the jury that, in order to constitute such adverse possession by inclosure alone, it is necessary that such inclosure should be of a substantial and permanent character, and that such inclosure must not be without the bounds of the land in controversy as claimed by the defendant in his plea, but upon lands to which the defendant claims title in himself:

"And the court further instructs the jury that the defendant cannot claim that any natural barriers, or cliffs, constitute such

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inclosure, unless the same was upon the line, or within the limits of the lands claimed by the defendant in his plea; and if the jury believe from the evidence that the inclosure relied upon by the defendant in this case as constituting adverse possession was not of a permanent and substantial character, or was not on the lands of the defendant, as set forth in said preceding instruction, as to said tracts or either of them, they must find for the plaintiff as to said tract or tracts.

"4. The court further instructs the jury that if they believe from the evidence that the adverse possession claimed by the defendant was broken and interrupted at any time after the month of October, 1880, the date of the death of Edward Nicholas Clopper; and if they further believe from the evidence that the heirs at law of the said Edward Nicholas Clopper have been under disabilities since the said date, then there can be no new adverse possession as against them, *and there being no adverse possession as against them, there can be no exclusive and adverse possession as against the other parties in interest, their co-tenants, and they must find for the plaintiffs.*

"5. The court further instructs the jury that if they believe from the evidence that the lands in controversy have been used for fifteen years prior to the institution of this suit for the grazing of live stock upon it, that it is not enclosed by a permanent and substantial fence, and that those who have lived upon it in a great many cases, have not remained upon it during the winter seasons; but that the premises have been frequently left vacant from the fall of the year unto the spring of the year following, and, moreover, that in one or more years the land was not occupied in the summer, except in the grazing of cattle, during the pasture season, then such use of said lands was not continuous, actual, adverse possession, even though cabins or houses were built upon the property, and if they further believe from the evidence, this is the only adverse possession proven, they must find for the plaintiffs.

"6. The court further instructs the jury that if they believe

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from the evidence that the Keister and the three Camphor tracts of land lie on the top of the Shenandoah Mountain, and that part of the said several tracts of land lie on the West Virginia side, and part on the Virginia side, as shown by the black lines on the plats made by Jasper Hawse, the surveyor, filed with his report of survey, and that the title under which the defendant claims said tracts of land was forfeited on the West Virginia side by failure to enter said tracts of land upon the land assessment books of Pendleton county, in the state of West Virginia, for the years 1869 and 1874, and some years thereafter, and that said tracts of land were sold by the commissioner of school-lands for the county of Pendleton, and the title vested in others, on April 13th, in the year 1887, they are further instructed that no adverse possession of such parts of said tracts of land lying on the West Virginia side can be claimed as against the state of West Virginia, so that the defendant could only plead adverse possession to such parts of said tracts of land since the date of said sale;

“And if they further believe from the evidence that the inclosure under which the defendant claims actual possession of said tract of land included within it those parts of said land which lie in the state of West Virginia, and which are forfeited as aforesaid, then the possession of the remainder of said tracts of land was not exclusive, and could not be availed of by the defendant during that period, as adverse possession of the parts of said land lying in the state of Virginia.

“7. The court further instructs the jury that if they believe from the evidence that the tract of land known as the Chambers & Clopper survey, which includes the tracts of land in controversy in this cause, was assessed upon the land books of Rockingham county, in the name of James B. Price, and that said tract of land was sold in the year 1886, for the taxes of 1876 to 1883, and was bought by the auditor of the state of Virginia for the benefit of the state, county and district, and that said tract of land remained unredemmed until the 28th day

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Statement.

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of April, 1900; then they are further instructed that the period from the date of said sale to the auditor as aforesaid, to the time of the institution of this suit, must not be included in the period of fifteen years, during which the defendant must show adverse possession in order to claim title by such possession to any part of the said tract of land.

"8. The court instructs the jury that adverse possession cannot consist merely of the cultivation of small parcels of land in potatoes and turnips for a season or two, inclosed by a fence, constructed of trees cut down so as to lap upon one another, with the space between filled in with logs or brush, or by both, and then abandoning such patches and the inclosure, and allowing the inclosure to go down and to nothing, and the patches to go into sod, and then clearing and cultivating other patches in the same way on other portions of the land from season to season, and from place to place; and if they believe from the evidence that this is the only adverse possession proven as to said tracts, or either of them, they must find for the plaintiffs as to such tract or tracts of land."

The defendant then tendered the following six instructions, which the court gave over the objection of the plaintiffs, and the plaintiffs again excepted:

"1. The jury are instructed that the plaintiffs must recover, if at all, on the strength of their own title, and cannot rely on weakness in title of the defendant; and the plaintiffs must show a good legal title and right to the possession of the land in controversy at the time this action was brought, and if they believe from the evidence, that at the time of the institution of this suit the plaintiffs were not possessed of a good legal title to the land in controversy, and entitled to the possession thereof at that time then they must find for the defendant.

"2. The jury are instructed that if they believe from the evidence that the tract of land called the 'Sugar Camp,' claimed by the defendant in this cause or any part thereof, is the land

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reserved in the Chambers and Clopper patent as the 50 acres reserved to Gawin Hamilton on Skidmore's Fork, they must find for the defendant as to that tract, though the actual area may be more than 50 acres.

"3. If the jury believe from the evidence that James B. Price in his lifetime conveyed the land in the declaration mentioned, or that part of it lying in Rockingham county, or his interest in said land, to the Rawley Iron & Coal Company; they must find for the defendant as to such interest as the said James B. Price had in said land at the time of the conveyance, unless they further believe from the evidence that the said James B. Price or the plaintiffs or those under whom they claim afterwards became re-invested with good title to the land or interest so conveyed to said Rawley Iron & Coal Company, before the commencement of this action, or such outstanding title was otherwise extinguished; and the court further instructs the jury that the deed from James B. Price to the Rawley Iron & Coal Company, dated June 14, 1883, is on its face an absolute conveyance of said land to the extent of the interest of the said James B. Price therein.

"4. The jury are instructed that in order to constitute adverse possession, it is not necessary that the land should be enclosed or built upon, but the entry by the defendant and those under whom he claims, must have been made under a claim of title with the intention of taking possession, and be accompanied with such visible, actual, adverse, continuous and exclusive acts of ownership as from their nature indicate a notorious claim to and possession of the property, and if they believe from the evidence that the defendant and those through whom he claims, took possession under a claim of title of the land in controversy, and have continuously for the period of fifteen years before the commencement of this action, exercised such actual, hostile, visible and exclusive acts of ownership over the lands as, from their nature, indicated a notorious claim to and possession of the property, they must find for the defendant.

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Statement.

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"5. The court instructs the jury that, while it is a principle of law that wild lands are not susceptible of adversary possession by one claiming title thereto against the owner of the true title, yet this rule extends to such lands only so long as they remain in a state of nature; and though the jury believe from the evidence that the land in controversy was wild land when conveyed by Moses Joseph to William Hoover and John C. Joseph, in March, 1868, yet, if they further believe from the evidence that the defendant and those under whom he claims, going back only to the deed from Moses Joseph in 1868, entered upon the land in controversy under a paper title, making *bona fide* claim thereto under said title, and not as mere trespassers or squatters, and by their acts of ownership thereon affected a substantial change in the condition of the land in the way of converting it from its wild state, and that these acts were accompanied by exclusive and notorious dominion over the land and by actual, exclusive, visible and notorious use and enjoyment thereof, in such manner as the land was best suited to, then the court further instructs the jury that such acts, dominion and use together constituted adversary possession of said land, whether the premises were inclosed or not and whether occupied by actual residence or not, and if the same continued without interruption for a period of fifteen years before the commencement of this action, the jury must find for the defendant.

"And the court further instructs the jury that adversary possession, as above defined, of any part of any one of the parcels of land claimed by the defendant, constitutes possession by defendant of the whole of such parcel to the limit of its boundaries as indicated in his title papers; but possession of a part of one parcel cannot be so extended as to constitute possession of another parcel unless co-terminous with it.

"6. If the jury believe from the evidence that William Hoover, under whom the defendant claims the land in controversy, sold the said land to Samuel Frank under an executory

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contract, which contract was afterwards rescinded and the property turned back to said Hoover, then the jury is instructed that the possession of said land by Frank, if he had possession, is to be considered as possession by the defendant and those under whom he claims, for the purpose of making out the statutory period of fifteen years."

*John E. Roller and Sipe & Harris*, for the plaintiffs in error.

*Conrad & Conrad*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Mary C. Merryman and others filed their declaration in ejectment at August Rules, 1895, in the circuit court of the county of Rockingham, against Isaac Hoover, to recover certain real estate therein described. Hoover appeared and disclaimed title and interest as to certain parts of the land demanded, and as to the residue, pleaded not guilty. The jury sworn in the case, on the 4th of October, 1905, found a verdict for the defendant, upon which judgment was entered, and the plaintiff procured a writ of error from this court, and, in their petition, assign as errors committed by the trial court:

First: That, after the plaintiffs had introduced their evidence of title to the lands in controversy, the defendant offered a deed from James B. Price, under whom plaintiffs claim in part, to the Rawley Iron & Coal Company, bearing date the 14th day of June, 1883, and duly admitted to record in the clerk's office of Rockingham county on the 18th day of June of the same year, which purported to convey the land in dispute in fee simple; it being intended by the defendant, by the introduction of this deed, to show that, in so far as they claimed under James B. Price and his heirs, there was such an outstanding title in another as defeated the right of plaintiffs to recover.

In order to meet this contention, the plaintiffs offered in



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evidence the record of the chancery cause entitled *Price, &c., v. Rawley Iron & Coal Company*, including the final decree therein, entered on the 6th day of June, 1905, before the trial of the ejectment suit, holding that the deed of the 14th day of June, 1883, and the deed of trust executed by the Rawley Iron & Coal Company contemporaneously therewith on the lands in controversy, constituted no blot upon the title of those claiming under James B. Price and the heirs at law of Nicholas Clopper, deceased, and no impediment to the assertion of their title. To the introduction of this record the defendant objected, on the ground that all that was necessary to defeat the action of the plaintiffs was for the defendant to show that such outstanding title existed at the date of the commencement of said action, to-wit, on the 13th day of August, 1895; and inasmuch as the deed of June 14, 1883, was duly admitted to record on the 18th day of June, 1883, and there had been no reconveyance of the land to the plaintiffs, or those under whom they claim, before the 13th day of August, 1895, such outstanding title at the time the suit was brought was conclusive of the right of the plaintiffs and it was not competent for them to show that the alleged outstanding title had been divested in any way, or that the plaintiffs, or those under whom they claimed, had been re-invested with title to the land in controversy subsequent to the date of the institution of the suit. This objection was sustained by the circuit court, which refused to permit the record in the chancery cause to be offered in evidence.

The precise contention of plaintiffs in error upon this point is that, while it is true that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and that an outstanding title in another may be shown in order to defeat the plaintiff's right of action, such outstanding title must be a present outstanding, operative and available legal title, on which the owner can recover against either of the contending parties if asserting it by action.

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Section 2725 of the Code, treating of actions in ejectment, says: "No person shall bring such action unless he has at the time of commencing it, a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof."

It would seem that this section is conclusive; but we will supplement it by the addition of adjudicated cases.

In *Suttle v. R., F. & P. R. Co.*, 76 Va. 284, Judge Staples, speaking for the court, said: "The doctrine generally understood in Virginia is that in ejectment the plaintiff must show a legal title in himself, and a present right of possession under it at the time of the commencement of the action. To this doctrine some exceptions exist—for instance, one in peaceable possession, and ousted by a stranger without title, may recover in ejectment on the strength of his mere previous possession; and a tenant is estopped to deny the title of his landlord."

None of the exceptions, however, exist in this case, and need not be considered.

In Warvelle on Ejectment, at section 228, it is said: "The same principle which, under the old practice, when the names of fictitious parties were used, prevented a recovery by the plaintiff unless he showed himself entitled to the possession at the time of the demise laid in the declaration, has remained practically unchanged through all the mutations to which the action has been subjected. The plaintiff must recover, if at all, upon his legal title as it stood at the commencement of the suit, or, as stated by many of the authorities, at the time alleged in the declaration that he had title, and it has been held in some cases that where the title displayed in evidence is shown to have accrued after such time, even though before the commencement of the suit, he cannot recover. The general rule, however, is as first stated, and under this rule, if the plaintiff is without legal title at the time of commencement of his suit, he cannot recover, notwithstanding he may have had an equity which ripened into a legal title after the suit was brought. He

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must recover, if at all, upon his title as it existed at the institution of his suit, and even though he has the legal title, yet, if, at the time suit was commenced, his right of possession was intercepted for any valid cause, he cannot recover, even though such intercepting cause is subsequently removed." Numerous authorities are cited in the note to this section, which fully sustain the text.

To the same effect is Newell on Ejectment, p. 360, sec. 7.

In Tyler on Ejectment, p. 75, it is said, that "The rule at common law, and in all of the states which have preserved the distinction between legal and equitable titles to land, is that the plaintiff in ejectment must show a legal title in himself to the lands he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery." There are cases which hold that after the purpose of a trust deed has been satisfied, the *cestui que trust* may maintain ejectment upon a demise in his own name, although the legal estate is still in the trustee. *Hopkins v. Ward*, 6 Munf. 38. But, without expressing any opinion upon that line of decisions, it is sufficient to say, that the case before us is not within them, for here there is an absolute deed from James B. Price, under whom plaintiffs in error claim, to the Rawley Iron & Coal Company, and a deed of trust executed by the Rawley Iron & Coal Company to the Guarantee Trust & Safe Deposit Company of Philadelphia, a corporation chartered under the laws of the Commonwealth of Pennsylvania.

In Adams on Ejectment (ed. of 1854), at p. 33, it is said to be a maxim of our law, that the party in possession of property is considered to be the owner, until the contrary is proved. It is necessary, therefore, for a claimant in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of the defendant's claim, for the possession of the latter gives him a right against every

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man who cannot establish a title; and if he can answer the case on the part of the claimant by showing the real title to be in another, it will be sufficient for his defense (excepting, of course, those cases in which the defendant is estopped from disputing the claimant's title), although he does not pretend that he holds the lands with the consent, or under the authority of the real owner."

The doctrine as to the title upon which a plaintiff must recover, if at all, in an action in ejectment, established by the cases and text-writers already quoted, is maintained in all its rigor by the Supreme Court of the United States. See *McNitt v. Turner*, 16 Wall. 352, 21 L. Ed. 341; *Moorehouse v. Phelps*, 21 How. 294, 10 L. Ed. 140; *Sheirburn v. D'Cordova*, 24 How. 423, 16 L. Ed. 741.

The outstanding title under consideration is evidenced by a deed from James B. Price and wife, under whom the plaintiffs claim part of the lands in controversy, purporting to convey an absolute title in fee simple to the Rawley Iron & Coal Company, a corporation of this state. The deed was executed on the 14th day of June, 1883, and was admitted to record on the 18th day of the same month. The Rawley Iron & Coal Company, grantee in the deed from Price, conveyed the same land to the Guarantee Trust & Safe Deposit Company of Philadelphia, a corporation chartered under the laws of the commonwealth of Pennsylvania, and this deed was admitted to record on the 18th day of June, 1883. The suit in chancery, brought with the object of cancelling these deeds and reinvesting the plaintiffs with the legal title, was not instituted until April, 1901, six years after the institution of the action in ejectment; and the final decree was not entered until the 16th day of June, 1905, ten years after the institution of the action in ejectment, and a few months before it was tried. The effect of those deeds was not only to constitute a sufficient ground of defense to the action of ejectment by showing an outstanding title in another, but they went to the very root and heart of the plaintiff's case,

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broke in upon and disrupted their paper title, and established beyond controversy that, at the date of the demise laid in the declaration and at the institution of the suit, they did not have "a subsisting interest in the premises claimed and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof." Code, sec. 2725.

We shall deal, however, more specifically with the contention of plaintiffs in error. Their position is that, while they must recover upon the strength of their own title, and not upon the weakness of that of their adversary, yet, if the defense rests upon an outstanding title in another, that title must be shown to be one which was a present, subsisting, operative legal title at the time of the trial of the case, and that, at the time of the trial, a court of competent jurisdiction had annulled the deeds from Price to the Rawley Iron & Coal Company, and from that company to the Guarantee Company; and that, therefore, it was not a present, outstanding title in another.

We think it has been made to appear that plaintiffs in error did not show a legal title in themselves at the institution of the suit; but, taking their case as they present it, they must equally fail.

With respect to the general principle as to the character of outstanding title which may be relied upon as a defense, there can be no doubt. It is fully established, so far as this court is concerned, by the decision in *Reusens v. Lawson*, 91 Va. 243, 21 S. E. 347, where Judge Buchanan says: "An outstanding title, sufficient to defeat a recovery in an action of ejectment, must be a present, subsisting and operative legal title, upon which the owner could recover if asserting it by action." For instance, if the statute of limitations constituted a bar to the outstanding title, it could not be set up as a defense: but to hold that a plaintiff could, after the institution of his suit, acquire from another an otherwise valid title, and thus make good the defect in his own title, would be at war with the fundamental principle recognized in all common law courts by innumerable

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adjudicated cases, by all the text-writers, and crystalized into a statute in this state, that the plaintiff in an action of ejectment must have in him the legal title at the institution of his suit.

We shall now consider the authorities relied upon by plaintiffs:

In *Jackson v. Todd*, 6 Johnson (N. Y.) 257, the facts are somewhat complicated, but a careful reading of the report will show that the deed from Dunbar, under whom Jackson claimed, to Brooks, which the defendant Todd relied upon as defeating the chain of title from Dunbar through Macy and others to Jackson, the plaintiff, was not a subsisting outstanding title at the date of the institution of the suit.

In *Jackson v. Hudson*, 3 Johnson (N. Y.) 375, 2 Am. Dec. 500, the general principle as to the character of the outstanding title as set out in *Reusens v. Lawson*, *supra*, is affirmed, and under the circumstances of that case, it was held that the lapse of time, during which no claimant under the alleged outstanding title had appeared, had been so great that the presumption was irresistible that it was no longer a subsisting title; and the further and decisive objection made to the outstanding title, that it did not appear to have been duly executed.

The case of *Perryman's Lessee v. Callison*, 1 Tenn. 515, is cited to show that, where the defendant is permitted to set up a title in a third person, the plaintiff having first shown a *prima facie* good title in himself at the time of bringing the action may show, that since the issue joined, he had procured the title of such third person. And the case, upon inspection, seems to be authority for that proposition. Turning, however, to the case of *Miller's Lessee v. Holt*, in the same volume, at p. 308, the question was whether it was competent for the defendant to show a better subsisting title out of the lessor of the plaintiff, and the court said: "Possession is always favored, and of itself, with color of title, is a title against all the world except the person having the best title. The law of England on the

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subject, is too clear to admit of doubt, nor could any reason be seen why the law should not apply here as well as there."

In *Crockett v. Campbell*, 2 Humphreys 411, the supreme court of Tennessee held, that deeds made after the commencement of a suit, confirming and ratifying deeds made before the commencement of the suit, are admissible in evidence, the court saying: "If the deeds confirmed were executed and properly proved and registered before the suit was commenced, they would pass the title by force of this confirmation, and vest it in the bargainee from their date. The deed of confirmation makes the acts of the attorney good at the date they were performed.

In *Lewis v. Curry*, 74 Mo. 49, it was held, that a plaintiff in ejectment may recover upon a deed obtained after the date of the demise laid in the petition; but upon looking to the facts, it will appear that, while the deed was obtained after the date of the demise laid in the declaration, it was prior to the institution of the suit; the court saying in its opinion, that there is nothing in the point that the demise laid in the petition is the 1st day of March, 1876, while the deed was made on the 27th day of April, 1876.

In *Martin v. Parker*, 26 Tex. 253, much relied upon by plaintiffs in error, the court, speaking of the outstanding title relied on in that case, said: It would seem that it "was barred by the statute of limitations when set up by the intervenor; or, if not barred, it was extinguished by having been bought in by the plaintiff before the trial. It was not a present, subsisting and operative title at that time, and could not, therefore, defeat a recovery by the plaintiff. The latter having, *prima facie*, a good title at the time of instituting the suit, had a right to protect himself by buying in the outstanding title, even after issue joined." Citing the cases which we have already considered. That case seems to be authority for the position of plaintiffs in error, but it stands alone.

In *Mexie v. Lewis*, 87 Texas 208, 22 S. W. 397, it is said: "It is laid down in this court as a general rule, that the plaintiff

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in an action of trespass to try title, must recover upon his title as it existed at the time of the institution of the suit; and that in order to avail himself of an after-acquired title, he must amend so as to avail himself of it as a new cause of action. An exception has been recognized in a case in which the plaintiff when he brings his suit has the superior title as against the defendant, and subsequently buys an outstanding title for the protection of that which he formerly held. *Martin v. Parker*, 26 Texas 254. This case does not fall within that exception. Nor, in our opinion, does it come within any other exception which has been recognized by this court."

*Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367, maintains the general proposition, that "an outstanding title in a third person, in order to defeat the plaintiff's recovery in ejectment, must be a present, subsisting, legal title, not one barred by the statute of limitations, abandoned or otherwise lost. It must be one which the party owning it could now assert. The burden is on the defendant to show the present validity of such title." But it is not authority for the proposition that it may be acquired by the plaintiff in ejectment after the institution of his suit, in order to mend a gap in his own title.

We are of opinion, therefore, that there was no error on the part of the circuit court in refusing to permit the record of the chancery suit of *Price v. Rawley Iron & Coal Co.* to be introduced in evidence in this case.

We think the modification made by the court in instruction No. 4, offered by plaintiffs in error, was clearly right, and that the law is correctly stated in *Malone on Real Property Trials*, at p. 293, where it is said: "If several tenants in common having a cause of action, one of whom is under disabilities and the others not, those under no disabilities will be barred by the statute, while the one under disabilities may recover. Each tenant in common has a right to sue and recover his interest; therefore, it is no excuse to say that a co-tenant was under disabilities."



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We think that there was no error to the prejudice of plaintiffs in error in refusing Instruction No. 5, even though it be conceded that it correctly propounded the law, for the court subsequently, at the instance of defendant in error, gave to the jury correct instructions upon the subject of adversary possession, very properly confining itself to the general principles of law controlling in such cases and leaving it to the jury, subject to the supervision of the court, to apply the principles to the facts in issue, rather than undertake to summarize those facts gathered from a voluminous record and present them to the jury, as was done in the instruction asked for, at the peril of omitting some fact which the evidence tended to prove, or of embracing some fact not sufficiently proved. This court has said in numerous cases, that the refusal of an instruction, even though it correctly propounds the law, will not be ground for reversal, if other instructions to the jury, upon the same subject, were sufficient to enable them correctly to apply the facts. The same principle obtains in other courts.

In *Armstrong v. Morrill*, 14 Wall. 120, 20 L. Ed. 765, it is said: "Where the instructions given were in all respects sufficient to dispose of the controversy, it is not error to refuse to give further instructions."

Instruction No. 6, offered by plaintiffs in error, was properly refused. The circuit court of Rockingham county had no jurisdiction over the land lying in West Virginia, and the forfeiture, under the law of that state, of so much of those parts of the original tracts of land as lay within its borders could not affect defendant's title by adversary possession to lands lying within this commonwealth, and within the jurisdiction of the circuit court of Rockingham county.

Nor were plaintiffs in error prejudiced by the refusal of the court to give Instruction No. 7, for, if the facts upon which that instruction is predicated be true, then the plaintiffs were out of court; for the same title in the commonwealth which was sufficient to disrupt the continuity of defendant's adverse

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possession, was equally efficacious to break the plaintiffs' chain of title; in other words, if the title was in the commonwealth at the institution of the suit, and was not restored to plaintiffs in error until the 28th of April, 1900, then, upon the authorities considered, with reference to the first assignment of error, there could be no recovery, for, as was said by this court in *Reusens v. Lawson, supra*, "There is no reason why a defendant in an action of ejectment should not be permitted to rely upon an outstanding legal title in the commonwealth. The plaintiff must rely upon the strength of his own title, and if it appear in the cause that the legal title is in another, whether that other be the defendant, the commonwealth or some other person, it shows that the plaintiff has not the legal title, and it is, therefore, sufficient to defeat his recovery."

In support of this assignment, plaintiffs in error rely upon *Armstrong v. Morrill, supra*. In that case (which, by the way, went from West Virginia, and involved, to some extent, a construction of the laws of that state prior to 1861), the defendant relied upon adversary possession, and it appeared from the facts that, during a part of the period necessary to bar the plaintiff's action under this plea, the title had been forfeited to the state; and the court held that this broke the continuity of the adversary possession, and that the two disjointed parts could not be computed in order to maintain the plea, the court saying: "Continuity of possession is one of the essential requisites to constitute such adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession, the seisin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseisin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute a new adverse possession for the time limited must be taken for that purpose." But it also ap-

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pears in that case, that before the institution of the suit, the plaintiff had redeemed the land, which had theretofore been forfeited to the commonwealth, and his full fee simple title had been restored to and was vested in him.

Upon the whole case, we are of opinion that the jury was correctly instructed, and, without discussing the evidence in detail, that the facts were sufficient—certainly when viewed, as we are bound to view them, as upon a demurrer to evidence—to sustain the verdict of the jury.

The judgment of the circuit court is, therefore, affirmed.

*Affirmed.*

## Statement.

**Richmond.**

## NORFOLK &amp; WESTERN RAILWAY CO. v. DEAN'S ADMINISTRATRIX.

November 21, 1907.

1. RAILROADS—*Personal Injury—Persons Walking on Track—Presumption—Duty of Company.*—The servants of a railroad company, in charge of one of its trains, have the right to assume that a grown person, in apparent possession of his faculties, seen walking on its track, will get out of the way of an approaching train, but when it is apparent that he is unconscious of his danger, it is their duty to do all they can, consistently with their higher duty to others, to save him from the consequences of his own act, regardless of whether he is guilty of contributory negligence or not. If his presence is observed by careful and experienced men operating the train, and they, in the exercise of their best discretion, do not regard him in danger, until, on getting nearer to him, he appears to be unconscious of his peril, and they then do all in their power to prevent an injury to him, though without avail, the company is not liable.
2. DEMURRER TO EVIDENCE—*Doubtful Conclusion.*—On a demurrer to evidence, if there is room for difference of opinion among reasonable men as to the conclusion to be reached, the demurrer should be overruled.

Error to a judgment of the Circuit Court of Tazewell county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Henry & Graham* and *S. D. May*, for the plaintiff in error.

*W. H. Werth* and *Chapman & Gillespie*, for the defendant in error.

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KEITH, P., delivered the opinion of the court.

Dean's Administratrix sued in the circuit court of Tazewell county to recover damages for the wrongful death of her intestate, and filed a declaration containing two counts, to which the defendant company demurred, and the court sustained the demurrer to the first, but overruled it to the second count. Thereupon the plaintiff filed another count, which was demurred to, and the demurrer overruled. A trial was then had, which resulted in a verdict of the jury, subject to the defendant's demurrer to the evidence. Upon that verdict the court rendered judgment in favor of the plaintiff, and the case is before us upon a writ of error awarded by one of the judges of this court.

The circuit court filed a written opinion in support of its judgment, in which it says that the first count in effect charges that the place on defendant's track where plaintiff's intestate was killed, was daily used by a large number of people, which fact was known to the defendant company, and thereby it became and was the duty of the defendant company to keep a lookout for persons on its track, so as to discover and not to injure them; that it neglected this duty, and by reason of this neglect, plaintiff's intestate was killed.

"The second count," continues the court, "avers, in effect, that, after the crew in charge of the defendant company's train had discovered intestate was on the track in front of said engine, and that he was unconscious of his danger, and would take no measure to protect himself from the danger, the said crew in charge of said engine failed to use any measures whatever to prevent injuring plaintiff."

The circuit court was of opinion that there could be no recovery upon the first count, because of the contributory negligence of the person injured, but rests the case solely upon the second count in the declaration, in which the case presented is that, after it became apparent to the crew in charge of defendant company's train that intestate of plaintiff was on the

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track in front of the engine, that he was unconscious of his danger and would take no measures to protect himself, the crew failed to use any measure to prevent the accident. Such being the issue to be determined, it is needless to consider so much of the evidence as relates to the use of the track as a public pass-way, or as to whether or not the person injured was a licensee or a trespasser. He was a human being, and when his dangerous position was seen and known, and that he himself was unconscious of his peril, and would take no measures for his own protection, it became the duty of the railroad company to do all that could be done consistent with its higher duties to others to save him from the consequences of his own act, regardless of whether he was guilty of contributory negligence or not. *Seaboard & Roanoke R. Co. v. Joyner's Admr.*, 92 Va. 355, 23 S. E. 773.

This being the narrow issue to be decided, it becomes necessary to consider the evidence bearing upon it with care, and if, as a result of that inquiry, it shall appear that there is room for a difference of opinion among reasonable men, then, in accordance with the decision of the Supreme Court of the United States in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. 679, and with *Kimball & Fink, Rec'rs, v. Friend's Admr.*, 95 Va. 125, 27 S. E. 901, which have been so frequently followed in this court, the case is one proper for a jury, and the demurrer to evidence should have been overruled.

At the point of the accident, the railway is double-tracked—one track being used by trains moving toward the west, and the other by trains moving toward the east. It was the habit of pedestrians who used these tracks for a pass-way to walk upon them in a direction opposite to that in which trains were accustomed to move, so that the train using the track would be in front of the person upon the track and moving toward him. A man walking west, therefore, would be upon the track used by eastbound trains, while a man going toward the east, would be upon the track used by trains going in the opposite direction.

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But, while this was the customary and usual way of moving the trains upon the tracks, it not unfrequently happened that a train going west would be upon the eastbound track, or a train going east upon the westbound track. In other words, the tracks were used at this point as was most convenient in the shifting and movement of trains in order to perform the various duties of the railroad company. Upon the morning of the accident there was a freight train, consisting of fifty-five or sixty cars, drawn by two engines, moving west upon the westbound track; and there was a light engine and tender, moving tender in front and also going west, upon the eastbound track. As they approached a bridge over Bluestone river, Dean, the man who was killed, was seen walking upon the eastbound track in front of the tender, and near the west-end of the bridge.

The first witness examined by defendant in error was A. W. Tabor. He did not see the accident, and his evidence bears only upon the locality, which we have endeavored to describe, its use by people and the result of certain experiments which he tried, tending to show how far down the track a man sitting upon the bumper of the tender of the engine that caused the accident, could have seen a man standing on the track; but his evidence is not very material, because, as has been already said, there is no doubt that the train men saw the deceased, and it may be conceded that they saw him at such a distance as that the engine might have been stopped without doing him any injury, if it further appears that he was then in apparent danger and was not likely to take any measures for his own protection.

The first witness for defendant in error who saw the accident was Whitworth. He says that, on the day in question, he was in charge of a coal train that works at Pocahontas at night; that he came to the Flat Top yards and got instructions to take his train to Mullin's siding, which is about a mile toward the east from Falls Mills, the station near which the accident occurred. Having put his train at Mullin's siding, as directed, he

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was returning, in accordance with his orders, to Flat Top yards, and was sitting on the back end of the tank, when he noticed a man walking down the track. The engine was moving, it will be remembered, tender in front. The witness, continuing, says: "When I first saw the man, I wasn't thinking about his being run over, and I didn't pay much attention to him until I got closer, and then I hollered, and signaled to the engineer to stop, but it didn't do any good, as he didn't pay any attention to it at all, and we ran over him and killed him." Dean was within two or three steps of being off the bridge when first seen by this witness at a distance of about three telegraph poles, or in the neighborhood of 180 feet. Witness says that he can't say exactly how far the engine moved while he was watching the man; that he was expecting him to step off the track; that it was a matter of daily occurrence that people walked on the railroad track until the engine was in eight or ten feet of them, when they would step off; and that "if we stopped the train every time we see a man on the track, it would take us from now until next Christmas to get to Bluefield;" but that probably it was half the distance between two and three telegraph poles "before I made any alarm, or something like that; I couldn't say exactly." The first signal which he gave to the engineer when he found that there was danger of injury to Dean was what the witness denominates as the "steady" signal—"I didn't wave him down, I just held my hand out." He was then examined rigidly as to what the result of the signal was—as to whether or not the engineer put on the emergency brake; but in reply to this line of examination the witness said, that he couldn't tell whether the emergency brake was put on or not, but that the brake was applied after he had given the signal. It appears further from his testimony that what is known as the "service" brake differs from the emergency brake only in degree—if the full force of air is turned upon the brake, that is an *emergency* brake; in ordinary cases, less than the full force is turned on, and that is the *service* brake. In other



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words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied.

The sum of this witness's testimony is this: That he first discovered Dean upon the track at a distance of about three telegraph poles, or 180 feet; that at the moment of his discovery he did not consider him in danger; that it is a very usual thing for people to walk on the railroad track, and by stepping to the right or left, they reach a place of safety, and that oftentimes this is not done until the train has approached within a few feet; that he had passed over about half the distance which had intervened between him and the man when he first saw him—that is to say, 90 or 100 feet—when he gave the engineer the signal to “steady;” that he couldn't say exactly at what point this signal was given; and that after he had passed over about half the remaining distance, it then appearing to him that the man was in danger, the engineer was given the second signal to stop his engine. It appears that during this time the bell was being rung by the fireman in the cab.

The next eye-witnesses to the accident examined testified on behalf of plaintiff in error, and their testimony is not to be considered upon demurrer to evidence, if it be in conflict with that of the witnesses for defendant in error.

R. B. Fergusson was the engineer in charge of the engine which did the injury. After leaving his train at Mullin's siding, he says, “I was on the eastbound track, going west, and there was a train going west on the westbound track when we struck Dean. We came around a little curve, and the fireman sitting up in the window and ringing the bell. He hollered to to me to look out, or hold her, or something to that effect. I slammed the brake in the emergency, and reversed my engine, and we ran down about a couple of engine-lengths, and he said we ran over a man, and I think we ran about two engine-lengths after he hollered at me before I came to a dead stop, and there was a man laying in the middle of the track.” The engineer did not see the man before he was killed. He was running at

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the rate of about 15 or 18 miles an hour. He is positive that he put on the emergency brake and reversed his engine at once. Again he says: "I gave her the whole braking power she had. She slid about two engine lengths—I couldn't tell you how far—and the wheels locked.

W. D. Tabor was the fireman on this engine. He says: "I saw some one walking in front of the engine on the track, and I called Mr. Ferguson's attention to it; just as soon as I did, he threw the air in the emergency and stopped as quick as he could. We had done run over the man, though, before he stopped." When witness first saw the man, he was about sixty feet away, and just getting off the bridge on the west end. This witness also states that he was at the time ringing the bell, and had been ringing it for nearly three-quarters of a mile; that the whistle was blown at the crossing above Falls Mills, and was also sounded by the engineer after the fireman called his attention to the man upon the track. Being asked whether there was anything else that could have been done to stop the engine and save the man, he replied: "No, sir." "What was the man doing when you saw him?" A.—"He was walking along the middle of the track and paid no attention, and didn't seem to know we were coming."

Defendant in error relies in great measure upon the statement of the witnesses, that Dean did not seem to be paying any attention. It must be remembered that his back was to the witnesses. They could not see his countenance, and their opinion would, therefore, seem to be of little value. The positive evidence, by the sole eye-witness of the accident, who testified on behalf of the defendant in error, is that he had his eye upon the man; that when he first saw him he did not consider him in danger; that as soon as he felt any apprehension as to the situation, he gave the engineer the signal to "steady," and immediately followed it with the signal to stop; that it was a matter of frequent occurrence to see men walking upon the track and remain upon it until the engine came close upon them.

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Reliance is placed by defendant in error upon the fact that the freight train was passing at the time, and that the noise it occasioned prevented Dean from hearing the train approaching him from the rear; but that circumstance would be of value only in dealing with the question of contributory negligence, and not with the duty of the railroad company after it actually saw Dean on the track.

So, too, the custom of the company to run its westbound trains upon the westbound track, and its eastbound trains upon the other track, is of no value in the determination of the precise point in issue here; the sole question being whether or not, after Dean's peril was discovered, the agents of the railroad company did all that was required of them to save him from injury.

There is no conflict of evidence here. If the statement of Whitworth, the conductor, be taken alone, all was done that should have been done under the circumstances of the case. If the emergency brake had been applied at the instant Whitworth discovered the presence of Dean upon the track, the accident would have been averted; but in the honest exercise of his discretion, in the light of his long experience, he did not, at that moment, consider Dean in a position of peril. He appears to have been an intelligent and capable official; and there is no reason to suppose that his conduct was not controlled by an honest purpose to do his duty, or that he did not give the signal to "steady" and then to stop to the engineer as soon as the danger of Dean's position became apparent to him.

If the testimony of Tabor, the fireman, and of Ferguson, the engineer, be looked to (and there seems to be no reason why their testimony should not be considered, being in support and not contradictory of the statements of Whitworth, who testified on behalf of the defendant in error), then the case is all the stronger for the plaintiff in error, for they show very clearly that the accident was due to no failure of duty upon their part, but that, with the light before them, they did all that careful

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and reasonable men could have done to save Dean from the consequences of his own temerity.

The law upon the facts, as here presented, is well settled.

In *N. & W. Ry. Co., v. Harman*, 83 Va. 577, 8 S. E. 258, it is said, that "if a person seen upon the track is an adult, and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of wilful negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness."

The same doctrine is stated in *Tyler, Receiver v. Sites*, 90 Va. 539, 19 S. E. 174.

In *Rangley v. Southern Ry. Co.*, 95 Va. 715, 30 S. E. 386, it is said that a railroad company has the right to assume that a grown person seen on its track will get out of the way of an approaching train, and the company is not liable unless it is shown that after the company, in the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury.

And in *Savage v. Southern Ry. Co.*, 103 Va. 422, 49 S. E. 484, it is said: "It may be that, had the engineer applied the brakes at the moment he came in sight of Savage upon the track, the accident could have been avoided. But such was not his duty. Seeing a man upon the track, in the apparent possession of all his faculties, the engineer had a right to presume that he would exercise reasonable care for his own protection. A step or two would have placed Savage in a position of safety. The duty devolved upon the engineer to stop the train only when he saw that Savage was in danger—that is to say, when he saw, or ought to have seen, that Savage was himself unconscious of his peril, and would take no measures for his own protection. This proposition has been decided in numerous cases by this court."

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The only witnesses whose evidence in this case bears directly upon the point in issue, show that the train men, in the exercise of their best discretion, measured up to the duty imposed upon them by the law.

We are of opinion, therefore, that the demurrer to evidence should have been sustained, and the judgment of the circuit court must be reversed.

*Reversed.*

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Statement.

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**Richmond.**

NORFOLK & WESTERN RAILWAY CO. v. BONDURANT'S ADMINISTRATOR.

November 21, 1907.

Absent, Cardwell, J.

1. **RAILROADS—*Infant Servants—Rule Excluding—False Representation as to Age.***—A general rule of a railroad company which forbids the employment of infants in its train service, is a reasonable rule, and an infant who, with knowledge of such rule, obtains service with the company by falsely representing himself to be of age, and is injured in the course of such service by reason of the negligence of the company's servants, cannot recover damages of the company for such injury, although his infancy in no way contributed to his injury. His position is that of a trespasser, or at most a bare licensee, to whom the company stands in no contractual relation and owes no other duty than not to injure him recklessly, wantonly, or wilfully.
2. **APPEAL AND ERROR—*Assignment of Error.***—A petition for a writ of error is sufficient if the points upon which reliance is had for a reversal are clearly stated and leave no doubt as to the questions presented for consideration, although it does not specifically state that the ruling of the trial court on this point or on that is assigned as error.

Error to a judgment of the Circuit Court of Amherst county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

After all the evidence had been introduced, the plaintiff asked

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the following instructions, which were given over the objection of the defendant, and the defendant excepted:

"1. The court instructs the jury that if they believe from the evidence that the defendant, through its duly authorized agents, issued and delivered to the plaintiff's intestate, C. N. Bondurant, the written instrument or permit which had been introduced in evidence marked Exhibit 'A' with the testimony of J. J. Whitlow; and if they further believe from the evidence that, at the time of his injury and death, he was upon one of the defendant's freight engines, for the purpose, and on the division, set forth therein, then it was the duty of the defendant, and of its agents and servants in charge of and operating trains of cars, upon which he was not at the time of his injury, to exercise ordinary care in the operation thereof, so as not to unnecessarily endanger him, and their failure to perform that duty would be negligence.

"2. The court instructs the jury that if they believe from the evidence that the permit mentioned in instruction No. 1 was obtained by the plaintiff's intestate by falsely representing himself to be over the age of 21 years, then, while the said intestate was riding upon the defendant's engine, by virtue thereof, the defendant owed him the exercise, only, of such ordinary care as it would have owed him had he in fact been over the age of twenty-one years; but it did owe him such ordinary care as it would have owed him if an adult, notwithstanding such misrepresentation.

"3. The court instructs the jury that if they believe from the evidence that the plaintiff was killed by the negligence of the defendant, its agents and servants, as set forth in the declaration, they must find for the plaintiff; notwithstanding the waiver by the plaintiff's intestate as contained in the permit, mentioned in instruction No. 1."

The defendant then tendered the following instructions, which the court refused, and the defendant again excepted:

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"1. The court instructs the jury that, under the permit issued by the defendant to C. N. Bondurant, and upon which he was riding at the time of the accident complained of, said Bondurant was not a servant of the defendant, but only a licensee to whom was not due the care and caution owing by a master to a servant.

"2. The court instructs the jury that a railway company does not owe to a licensee the duty of employing competent servants to manage its trains, or to run them in a particular manner, or at a particular rate of speed.

"3. The court instructs the jury that, if they believe from the evidence that the plaintiff's intestate, in order to enter the service of the defendant company, falsely represented that he was over twenty-one years of age, when he knew, or had good reason to know, that such statement was not true, and that the rules of the defendant forbade the employment of minors in its operating department, they must find a verdict for the defendant.

"4. The court instructs the jury that if they believe from the evidence that C. N. Bondurant made application for the service as fireman with the defendant on May 3, 1906, and stated in said application that he was over twenty-one years of age; that said statement was false, and that Bondurant knew, or had good reason to know, that the same was not true; that the defendant's rules forbade the employment in its train service of minors; that acting upon the statement as to his age, and with no knowledge of its falsity, the defendant issued to said Bondurant the permit set forth in the declaration, and that while upon one of defendant's engines pursuant to said permit, he received injuries which resulted in his death, then the jury must find a verdict for the defendant."

*F. S. Kirkpatrick*, for the plaintiff in error.

*Lee & Howard*, for the defendant in error.



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KEITH, P., delivered the opinion of the court.

C. N. Bondurant, the plaintiff's intestate, was killed in May, 1906, by a rear-end collision upon the Norfolk and Western railroad, under circumstances which, it is conceded, would, as against a passenger or an employee of the railroad company, have constituted actionable negligence.

The young man who was killed desired to become a fireman on the Norfolk and Western railroad, and to learn the duties of that position, filed an application on May 3, 1906, in which, in reply to one of the printed questions, he stated that he was born on the 27th day of April, 1884, and was, therefore, on the date of the application, in his 22nd year. One of the rules of the company provides that, "Minors must not be employed without the written consent of parents or guardians on prescribed form, which must be filed with personal records, and must not, under any circumstances, be employed in the train service."

The evidence tends to show that, while young Bondurant may not have known of the precise terms of this rule, he did know, and his attention was specifically directed to, the fact, that the rules of the company forbade the employment of infants.

Upon his written application, a permit was granted to him, which is set forth in the declaration in the following words: "Permit the bearer, C. N. Bondurant, upon presentation of this order, duly signed by him and witnessed, to ride on freight engines of the company for the purpose of learning the duties of a fireman, for duty as a fireman in the service of the company hereafter.

"It is understood and agreed, that Mr. C. N. Bondurant uses this permit at his own risk and expense, without compensation; that he assumes all hazard and risk of personal injury and damages, whether arising from negligence of the Norfolk and Western Railway Company or its employees or otherwise, and that the Norfolk and Western Railway Company shall not be

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held liable for any injury so sustained or for any damages resulting therefrom.

"This permit is not good on passenger engines, and expires June 3, 1906.

"L. P. LIGON,

"Division Master Mechanic."

"I, C. N. Bondurant, the applicant above mentioned, do hereby accept and agree to the terms and stipulations of the above permit, and I do certify that I am more than twenty-one years of age.

"Witness my signature this 3rd day of May, 1906.

"C. N. BONDURANT.

Witness: C. M. MAYS."

It was under these circumstances that C. N. Bondurant was upon the engine at the time he received the fatal injury, for which his administrator brings this suit.

At the instance of the defendant in error, four instructions were given to the jury, to which the plaintiff in error excepted; and four instructions were asked for by the plaintiff in error, to the refusal of which, on the part of the court, an exception was also noted.

The controlling question is: What was the duty and degree of care owed by the railway company to defendant in error's intestate under the circumstances of this case?

The theory upon which the case was tried, the verdict rendered, and the judgment entered, was that there was a contractual relation between the deceased and the railway company, by which he became an employee, to whom the defendant owed the duty of ordinary care. In other words, that the relation existing between Bondurant and the company was that of master and servant, with all the mutual duties and responsibilities which that relation implies. The contention on behalf of the plaintiff in error is that young Bondurant was a trespasser to

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whom the company owed no duty except not to injure him wantonly, recklessly, or wilfully.

A student fireman may, or may not, be an employee; whether he is or not in a particular case, depends upon circumstances.

In *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 Pac. Rep. 439, cited by defendant in error, it was held that a student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a fellow servant of the other brakemen, although he was receiving no pecuniary compensation.

So, in *Barston's Admr. v. Old Colony R. Co.*, 143 Mass. 535. 10 N. E. 255, it was held, that if a person undertake voluntarily to perform service for a corporation, and the agent of such corporation assents to his performing such service, he stands in the relation of a servant of the corporation while so engaged; which is the proposition in this case for which we presume it was cited by the defendant in error, and as to the correctness of which there can be no doubt.

In *Hewett v. Woman's Hospital Aid Association*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496, it was held, that a pupil nurse, employed in a hospital maintained by a charitable corporation, under a contract whereby she is to receive professional training, and be paid a small remuneration, is a servant of the corporation, and not a recipient of its bounty. It appears in that case that the plaintiff was 19 years of age, and that the hospital authorities put her in charge of a case of diphtheria without disclosing to her the nature of the malady. She contracted the disease, and brought suit for the wrong done her. The question discussed in the case was whether or not a charitable corporation which is engaged in the maintenance of a hospital, and which holds its property for that general purpose, is liable for injuries resulting from a negligent failure to warn

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its servants concerning the nature of their employment; and the hospital was held to be liable.

In *Millsap's Admr. v. Louisville &c. Ry. Co.*, 69 Miss. 423, 13 South. 696, it was held that one who, by permission of a railway company acts as fireman of its locomotive, is a servant of the company, though he acts without compensation merely to learn the business. He was also held to be a fellow servant of the train dispatcher, whose negligence caused the injury, and, therefore, a recovery was denied.

But, in none of these cases was there misrepresentation as to age, or a rule prohibiting the employment of infants.

In the case of *Youll v. Sioux City & Pac. Ry. Co.*, reported in 66 Ia. 346, 23 N. W. 736, 21 A. & E. Railroad Cas. 589, the supreme court of Iowa held that the mere fact that a brakeman injured was a minor will not entitle him to recover for such injury, if he was physically able to perform the duties he was employed to do, and, in the absence of evidence to the contrary, it will be presumed that he was of ordinary intelligence. There the contention seems to have been that the infant was entitled to recover under circumstances which would have precluded a recovery had he been an adult; but the court being of opinion, in the absence of evidence to the contrary, that he was a person of ordinary intelligence, held that the railroad company was not negligent in employing him as a brakeman, there being no evidence to show that he was inexperienced in the duties of that position; that he was to be treated for the purposes of that case as an adult; and that he could not recover.

As we have said, in all of these cases there is an absence of two circumstances upon which plaintiff in error rests its case—first, that the railroad company prohibited the employment of an infant; and, second, that the deceased, by misrepresenting his age, obtained permission to ride upon the engine where he was injured.

Defendant in error also relies on *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869. In that case, the state of

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Washington prohibited by law the employment of infants under 14 years of age; and the infant represented himself as over 14 years of age, when, in point of fact, he was only 12. The court held broadly that infants are not liable for torts connected with or growing out of contracts, and the doctrine of estoppel *in pais* does not apply to them. In support of the opinion, *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87, is cited, where the court said: "The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this, there can be no doubt founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity."

In the *Kirkham* case, the railroad company had violated a positive law by employing an infant within the prohibited age, and it differs in its facts from the case before us.

Cases of negligence have become so numerous that it is impossible to discuss all that bear upon the subject, and, therefore, it becomes necessary to select those which are most pertinent.

In the case of *Fitzmaurice v. N. Y., N. H., & H. R. Co.*, 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, the facts were as follows: The plaintiff, while riding upon a train of the defendant, was injured by a collision, and no question was made that she would have been entitled to a verdict in her favor if she had been a passenger. She was a minor, and was riding upon a three-months' season ticket, which was good only for students under eighteen years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate, purporting to be signed by her father, that she was under eighteen years of age, and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from school, and also presenting a certifi-

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cate, purporting to be signed by "J. F. Miner, Principal, Hollander Art School, Boylston Street, Boston, Mass.," that she was a pupil in his school, and, as he fully believed, intended to remain so for the next three months. She was at this time over eighteen years of age, as she testified, lived in Marlboro, and was employed in Hollander's dry goods store in Boston. The regular price for a season ticket was \$32; the reduced rate for students under eighteen years of age, at which the plaintiff procured it, was \$16. She had been riding upon this ticket nearly every day, except Sunday, for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words, "Good only for a person under eighteen years of age." The jury having found the amount of the plaintiff's damages, if she was entitled to recover, the judge ordered a verdict for the defendant. Upon this state of facts, the supreme court of Massachusetts held: "The defendant had the right to establish a reduced rate for students under a fixed age. \* \* \* The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practiced upon the defendant. She had no right to profit by her fraud. She had no right to rely upon the consent of the railway company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly she was not lawfully upon the defendant's train. She was in no better position than that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a person travelling over a railroad on a free pass or a mileage ticket which had been issued to another name, and was not transferable, was barred by his fraudulent conduct, from recovering for a personal injury, unless it was

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due to negligence so gross as to show a wilful injury. *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 70, 28 Am. St. Rep. 613; *Way v. Chicago, R. I. & P. R. Co.*, 64 Ia. 48, 52 Am. St. Rep. 431, 19 N. W. 828. If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any wilful or reckless injury. *Condran v. Chicago, M. & St. P. R. Co.*, 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61, 19 Am. St. Rep. 17, 22, N. E. 812. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practicing a fraud. The only relation which existed between the plaintiff and defendant was induced by her fraud; and, as was said by the court in *Way v. Chicago, R. I. & P. R. Co.*, *ubi supra*, she cannot be allowed to set up that relation against the defendant as a basis of recovery. See also, to the same effect, *Godfrey v. Ohio & M. R. Co.*, 116 Ind. 30, 18 N. E. 61; *McVeety v. St. Paul, M. & M. R. Co.*, 45 Minn. 268, 11 L. R. A. 174, 22 Am. St. Rep. 728, 47 N. W. 809; *McNeil v. Durham & C. R. Co.*, 132 N. C. 510, 67 L. R. A. 227, 95 Am. St. Rep. 641, 44 S. E. 34.

"Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. This simply showed that she had succeeded in carrying her scheme to completion. There had been a similar acceptance by the conductor in *Way v. Chicago, R. I. & P. R. Co.* and *Toledo, W. & W. R. Co. v. Beggs*, *ubi supra*. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect; if they knew the facts and acquiesced in the plaintiff's wrongful purpose, this conduct could give her no additional rights. *McVeety v. St. Paul, M. & M. R. Co.*, and *Condran v. Chicago, M. & St. P. R. Co.*, *ubi supra*."

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This case is annotated in 6 L. R. A. (N. S.) 1146, and a number of cases, not cited in the opinion, are mentioned in the note; and it seems to us to be not only good law, but good morals as well. It so completely covers the case under consideration, and is so well supported by the reasoning of the court and the authorities cited, that we are content to rest upon it.

Defendant in error relies also upon the argument that there was no relation between the misrepresentation of Bondurant as to his age and the accident by which he was injured.

It is true, that his being an infant in no way contributed to the accident. It is equally true, that in *Fitzmaurice v. Railroad, supra*, the fact that plaintiff was over eighteen years of age in no wise contributed to the accident. Doubtless the accident would have taken place whether Bondurant had been upon the engine or not; but if he had not been upon the engine, he would not have been injured by the collision. The controlling question in this case, however, is, in what relation did the intestate of the defendant in error stand to the railroad company at the time of the injury, and what duty did the railroad company owe to him? It is as true of him as it was of Miss Fitzmaurice that the only relation which existed between him and the railroad company was induced by fraud. But for his fraud and misrepresentation, he could never have been upon the engine. He was, therefore, a trespasser, or at most a bare licensee, to whom the railroad company stood in no contractual relation and owed no other duty than not to injure him recklessly, wantonly or wilfully.

The law is settled that it is one of the primary non-assignable duties of a corporation with a large number of employees, performing difficult and dangerous duties, to prescribe and promulgate rules for their government. In the performance of its duty, the Norfolk and Western Railway Company adopted a rule prohibiting the employment of infants under 21 years of age, without the consent of parents or guardian. It is a reasonable and salutary rule, from whatever point of view it may be con-



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sidered. It shields and safeguards the infant from the consequences of his inexperience and temerity, and promotes the safety of the public by securing mature and efficient employees for the discharge of the dangerous and difficult duties pertaining to a common carrier of passengers and freight. It would be a hard measure of justice to hold a company responsible, on the one hand, for failure to prescribe rules, and on the other, to refuse to protect it from the consequences of the violation of reasonable and proper rules, adopted and promulgated in the discharge of the duty imposed by law.

There is neither averment nor proof that the injury was inflicted recklessly, wantonly or wilfully. We are, therefore, of opinion that it was error to give the instructions asked for by defendant in error, and to refuse to give those asked for by plaintiff in error.

The point is made by defendant in error that there is no proper assignment of errors in the petition in this case. As we have seen, instructions were asked for on the part of the plaintiff and defendant, all of which are covered by plaintiff in error's bills of exception, and while it is not specifically stated in the petition that the ruling of the court upon this point or upon that is assigned as error, the points upon which reliance is had to secure a reversal are clearly stated, and can leave no doubt as to the questions presented for our consideration.

Upon the whole case, we are of opinion that the judgment of the circuit court should be reversed, and a new trial awarded.

*Reversed.*

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Syllabus.

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**Richmond.**

**ROLLER V. MURRAY AND OTHERS.**

November 21, 1907.

Absent, Cardwell, J.

1. **EQUITY PLEADING—*Amendments.***—If a plaintiff misdescribes his contract in his original bill, or omits to mention a subsequent modification, or a re-execution of the contract sued on, the error or omission may be corrected by amendment before an answer is filed or evidence taken; and even where the evidence disclosed a misdescription of the contract sued on, the complainant may be permitted to amend his bill to conform to the proof.
2. **EQUITY PLEADING—*Demurrer—Consideration of all Pleadings and Exhibits.***—Though a supplemental bill should intend to deny a material fact set forth in the original bill, and supported by exhibits filed therewith, the court is not bound on demurrer to give effect to such intent, if the contrary appears from the complainant's exhibits or from his case as a whole, but will interpret for itself the documents and contracts exhibited, in the light furnished by their own provisions and surrounding circumstances, and in the light of the other exhibits and the other allegations of the pleadings.
3. **CONTRACTS—*Champerty—Present Status.***—A contract by an attorney to undertake and carry on litigation at his own risk, or without costs to his client, for a share of the recovery, is contrary to public policy and void. The law of champerty as affecting civil contracts is not obsolete and inoperative in this state, nor is it affected by the repeal by implication of the statute, declaratory of the common law, making champerty a criminal offense.
4. **CONTRACTS—*Champerty—Purging Illegality.***—Where a champertous contract has been entered into between attorney and client, and, after a large portion of the property has been recovered under it, the parties reduce the contract to writing embracing the whole property originally in dispute and therein stipulate that all expenses shall be paid out of the proceeds of the land recovered, and that the attorney shall indemnify and save the client harmless against all costs, the contract is not purged of its illegality, even

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- though the land already recovered be sufficient to pay such costs.
5. CONTRACTS—*Champerty—Parties—Privies*.—A donee of land who agrees to “take the shoes” of the donor in a champertous contract with an attorney for the recovery of the land, is not a stranger to the contract, and may set up the defense of champerty to a suit by the attorney for his share of the recovery.
  6. CONTRACTS—*Champerty—Quantum Meruit—Equity*.—Whether an attorney, who fails to recover on a champertous contract can recover on a *quantum meruit*, cannot be determined in a suit in equity instituted by him which goes out of court on a demurrer for lack of equity.
  7. CONFLICT OF LAWS—*Contracts for Land—Champerty*.—Whether a contract for the recovery of land situated in Virginia is champertous or not, is to be determined by the laws of Virginia.
  8. EQUITY PLEADING—*Amendments*.—Where a bill has been twice amended, the evidence taken, and the case fully heard and decided on its merits, further amendments, offered without explanation or excuse, are properly rejected.
  9. EQUITY JURISDICTION—*Land in Another State*.—A court of equity in this state cannot decree the sale of land lying in another state.

Appeal from a decree of the Circuit Court of Rockingham county. Decree for defendant. Complainant appeals.

*Affirmed.*

The opinion states the case.

*Sipe & Harris* and *John E. Roller*, for the appellant.

*Conrad & Conrad*, *Holmes Conrad* and *D. O. Deckert*, for the appellees.

KEITH, P., delivered the opinion of the court.

In this case there was a demurrer to the bill in the circuit court, which was sustained and the bill dismissed. Appellant then asked leave to amend his bill, which the circuit court denied, and in support of its decree, dismissing the bill upon demurrer and rejecting the offer to amend, the judge of the

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circuit court filed two opinions, which deal with the subject in a manner so satisfactory that we feel that we cannot do better than to adopt them, making only slight verbal changes.

"This cause comes on to be decided on a demurrer filed by Mary H. Murray to the bill, as amended by an amended bill filed in 1902, and as amended and supplemented by an amended and supplemental bill filed April 27, 1906.

"The grounds assigned for the demurrer go both to the character of amendment (it being objected that the new matter introduced by way of amendment makes a new and different case from that presented by the original bill), and to the merits of the case presented by the bills and the exhibits filed with them (it being insisted in this behalf that the contract set up by complainant and relied on as the foundation of the claim he invokes the powers of the court to enforce, is champertous and void). In view of the conclusion I have reached upon the latter question, it is hardly worth while to pass upon the question of pleading. I may say, however, that I consider the amendments made as well within the privileges of our practice with respect to amendments.

"All three of the bills assert, as the gravamen of the plaintiff's case, an equitable right to one-fifth of the purchase price arising on the sale of the Hollingsworth lands by Mrs. Murray to Geo. A. Wheelock (apparently relying on an equitable assignment, though without so naming the equity claimed), and to the benefit of the security of the deed of trust given by Wheelock upon the land to secure the purchase money; notice to Wheelock of the plaintiff's rights being alleged, and the prayer of all the bills being that these rights be established by the court, and that the Wheelock deed of trust be enforced for plaintiff's benefit, notwithstanding the subsequent release of that deed and of Wheelock by the act of Mrs. Murray.

"The averments relative to the contract with Miss Emily Hollingsworth, which constitutes the foundation of the equity asserted and the relief sought, do vary slightly in the various

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bills, but not, in my judgment, in any material respect affecting the character of the claim asserted or the relief sought. They each, if valid, result in giving the plaintiff the equity he claims, to-wit: a right to a one-fifth share of the proceeds of the sale of the lands. If a plaintiff misdescribes his contract in his bill, or, in his original bill, omits to mention a subsequent modification, or a re-execution of the contract sued on, he can certainly correct the error or omission by amendment before an answer is filed or evidence is taken; and even after the taking of evidence discloses the fact that the contract forming the subject matter of the suit was different from that described in the bill, the plaintiff may be permitted to amend his bill to conform to the proofs.

"The argument of counsel was more particularly addressed at the hearing to the validity of the contract or contracts set forth in the plaintiff's pleadings and exhibits as the foundation of his claim, as affected by the question of champerty; and this question is one of more serious concern.

"I cannot agree with the idea suggested in the argument, that the whole law of champerty is obsolete and inoperative in Virginia. The latest legislative enactment relative to counsel fees is section 3201a of Pollard's Code (Acts, 1904, p. 263), the last paragraph of which is in these words: "Provided, that nothing herein contained shall affect the existing law in respect to champertous contracts." The old conception that a contract by an attorney for a contingent fee came under the ban of the law against champerty, has been repudiated in many of the American states, and among these in Virginia. In very few, if any, jurisdictions, however, is it held that a contract by an attorney to undertake and carry on litigation at his own risk as to costs, in consideration of a share of the anticipated recovery, is not contrary to the policy of the law, champertous and void.

"No question of this sort was decided or raised in the case of *McDonald v. Logan*, 2 Va. Dec. 687, 34 S. E. 490, (cited by counsel for complainants). That was not a suit to enforce a

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claim for counsel fees. It was a suit brought by the client (Logan) against his counsel to recover of them the proportion of the charges which had come out of his share of a certain fund administered by West Virginia courts in the course of litigation in that state, the relief being demanded by Logan against his counsel on the ground that, under his contract with them, his counsel were to receive fifty *per cent.* of the recovery, and out of it pay all costs and charges. The counsel had already received their compensation, and the suit was by the client to recover back a portion of it. No question of champerty was raised, but the recovery claimed was denied.

"The latest expression of our court of appeals on the subject of champerty is found in the case of *Nickels v. Kane*, 82 Va. 309, in which it is said: "champerty may be defined to be a bargain with the plaintiff or defendant in a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit, which the champertor undertakes to carry on at his own expense; and champerty avoids the contracts into which it enters.' And it is expressly stated further on in the opinion, that the principles of the common law with reference to champertous contracts remain in force in Virginia.

"So far from being obsolete law is it, that there are many late cases in the various states of the Union, and in the Federal courts, in which the law has been applied, and the cases and text-writers are practically uniform in holding that a contract by an attorney to undertake and carry on litigation at his own risk, or without cost to his client, for a share of the recovery, is contrary to public policy and void. The following are instructive cases on the subject: *Peck v. Heurich*, 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. 927; *Johnson v. Van Wyck*, 4 App. D. C. 294, 41 L. R. A. 520; *Greer v. Frank*, 179 Ill. 570. 53 N. E. 965, 45 L. R. A. 110.

"The employment undertaken by the complainant in this case was the recovery of 52,000 acres of mountain land, known as the Hollingsworth survey, which had been sold for taxes dur-

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ing the war, and was, at the time of the contract in question, held adversely by various claimants thereof under hostile titles. The complainant stated orally at the argument, that the number of adverse holders was about 200.

"The original contract between complainant and his client, Miss Emily Hollingsworth, of Philadelphia, appears from the amended bill, filed in 1902, to have been made by correspondence, the letters evidencing the contract being Exhibits 1, 2, and 3 filed with that bill, and prayed to be read as part of it. The first of these letters is one from R. C. McMurtrie, the attorney and agent of Miss Hollingsworth in Philadelphia, to General Roller, dated January 24, 1873, and it states the conditions of the proposed employment in distinct terms, saying: 'Miss Hollingsworth will agree to give you one-fifth of the net proceeds of all lands recovered, you paying all expenses of the litigation that may be necessary for that purpose, so that she is required at no time to pay any money for anything connected with the business.'

"To this letter the complainant wrote an answer (Exhibit 2) on February 1, 1873, in which he said: 'I regard your letter of the 24th as a substantial acceptance of my terms. I ask two limitations upon the proposition contained in your letter. First, that Miss Hollingsworth shall bear the expense of any proceedings that may be necessary in Philadelphia—it appears elsewhere that Miss Hollingsworth was not at that time the owner of the legal title, but had to acquire it. I will bear all expense in Virginia connected with the suit, but am not willing to pledge myself to any expenses outside of the state, because I can't anticipate the amounts of them. Second, that my interest in the land shall not be sold, unless I agree to the price. As your letter reads, she could sell at any price, and I must be content with my share of the "*net proceeds*." By net proceeds. I presume you mean proceeds after deducting expenses of suit and sale.'

"On February 3, 1873, Mr. McMurtrie answered the letter of

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General Roller, accepting the limitations or qualifications proposed by him. These letters evidence the consummation of a contract, which, it is alleged, was authorized and approved by Miss Hollingsworth.

"The contract effected by them fulfills completely the definition of champerty, and falls under the prohibition of the law. That the contract so evidenced was the original contract of complainant's employment, under which he acted and instituted various actions to recover the lands in question, is not negated by the averments of the supplemental bill, as I construe them. If the supplemental bill were so intended, I conceive that the court would not be bound on demurrer to give effect to such intendment, if the contrary appeared from the plaintiff's exhibits, or from his case as a whole, but would interpret for itself the documents and contracts exhibited, in the light furnished by their own provisions and surrounding circumstances, and in the light of the other exhibits and the other allegations of the pleadings.

"The three letters filed as Exhibits 1, 2 and 3 themselves evince a contract, and the amended bill proceeds: 'Subsequently your complainant, acting as the attorney for the said Emily Hollingsworth, by the institution of suits and otherwise, recovered the whole of said tract of land from those holding the same adversely, and he thus became entitled to the compensation which had been agreed upon between him and the said Emily Hollingsworth under the contract aforesaid.' And in Exhibits Nos. 5 and 6 (filed with the amended and supplemental bill), being letters from complainant to Miss Hollingsworth, dated May 31, 1875, and June 3, 1875, the complainant refers to a tract of 10,075 acres which had, at that time, been recovered, and encloses to her a deed to be executed by her, to convey to him a one-fifth interest therein, saying in the letter of June 3, 1875: 'As to the deed which I enclose to you, you will find that it is in exact accordance with Mr. McMurtrie's offer to me by letter of January 24, 1875, and my letter of ac-



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ceptance February 1, 1873,' and later in the same letter, 'I agree with you in thinking there ought to be a regular contract in writing between us, signed and acknowledged, and will prepare one if you wish it. I have rested content with Mr. McMurtrie's letters, knowing that he would do just what he had promised for you.' The amended and supplemental bill does seek to mitigate the force of the exhibits evidencing the original contract, and avers that the reference to them in the amended bill has been misunderstood, in that they have been supposed to 'embody the contract intended to be referred to in them, *the contract upon which this complainant has brought this suit*, when, in fact, it was subsequently made and entered into in writing between the said Emily Hollingsworth and this respondent.' I understand this averment to mean, not that the contract evidenced by the letters never existed, but that the contract was later reduced to the form of a written instrument, upon which latter complainant bases his claims. The written contract, subsequently signed by the parties, is filed as Exhibit No. 4, with the amended and supplemental bill. It bears date July 10, 1875, and is manifestly the contract to be drawn, alluded to in General Roller's letter of June 3, 1875, (Exhibit No. 6), in which letter Exhibits Nos. 1, 2 and 3 (the letters of 1873) are referred to as evidencing the contract existing between the parties, and the contract which it was proposed to reduce to the form of a signed instrument.

"Exhibit No. 7 is a letter from General Roller to Miss Hollingsworth, dated July 7, 1875, in which he says: 'I enclose our agreement prepared in accordance with your request. I enclose duplicate copies. Retain one and enclose the other to me. Please have Mr. McMurtrie to examine it in connection with our letters of January 24, 1873, and February 1, 1873, respectively.' Here the letters of 1873 are again invoked as the evidence of the contract existing between the parties, and to verify the correctness of the written instrument enclosed to be signed. The amended and supplemental bill alleges that the

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written instrument was signed, and that that is the contract on which this suit is brought.

"Is this contract free of the illegality of the original undertaking? If it is ambiguous in respect to the matter of costs and expenses, it is to be construed in the light shed upon it by Exhibits 1, 2 and 3, and the correspondence attending its preparation and execution, and these, I think, leave no room for doubt about the question. It is to be remembered also that the employment of the complainant, as evidenced by the letters, took place about February 1, 1873, while Exhibit 4 is dated July 10, 1875; so that nearly two and a half years had elapsed between the commencement of his connection with Miss Hollingsworth as her counsel and the execution of Exhibit 4, and in this interval of time much had been done in the performance of his undertaking to recover the land.

"Exhibit 4 recites that of the 52,000 acres of land there had already been recovered the Loose tract of 13,800 acres, the Davis tract of 2,700 acres, and the Gray J. Peyton tract of 10,075 acres, aggregating in all 26,575 acres.

"With respect to costs and expenses, Exhibit 4 contains the following provisions: 'Emily Hollingsworth agrees to pay \* \* \* all expenses which may be incurred in the expected litigation outside of Virginia, all expenses in Virginia of the litigation that may be necessary, and expenses of any sale that may be made, are to be paid out of the proceeds of the lands recovered. Emily Hollingsworth is to be at no time required to pay any money for anything connected with the litigation in Virginia. If these expenses are paid by John E. Roller, he is to be reimbursed out of the proceeds of the land recovered.' The contract in terms covers the whole 52,000 acres of land, applying to those portions which had at that time already been recovered as well as to those portions yet in controversy; and I am disposed to agree with counsel for complainant that the lands already recovered furnished the means, under the terms of the contract, to the extent of their value, for the payment of costs

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attending the unfinished litigation, as well as the costs of that which was ended. Yet, if this is so, it is in exact conformity with the original contract evidenced by the letters of 1873, by which it was agreed that General Roller should have one-fifth of the net proceeds of the land, meaning by net proceeds, as stated, 'proceeds after deducting expenses of suit and sale.'

"Under the circumstances recited, I am unable to perceive how the signed writing of July 10, 1875, can be considered a new contract, purged of the illegality that inhered in the old. It was obviously intended as a reduction to formal writing of the agreement evidenced by the letters, and it conforms to and ratifies that agreement. Under the original agreement, the complainant was to be reimbursed his outlay for costs and expenses, in the event of success, out of the lands recovered, and the paper of July 10, 1875, recognizes this fact and applies it to the existing situation. There are other considerations affecting the paper of July 10, 1875, which bring about the same result. If it were the only evidence of the contract between the parties, the first and last, would it not be open to the same objection of illegality? In it General Roller distinctly undertakes to institute and carry on litigation to recover the 52,000 acres of land, and in it he and his client distinctly stipulate that the latter 'is to be at no time required to pay any money for anything connected with the litigation in Virginia. If these expenses are paid by John E. Roller, he is to be reimbursed out of the proceeds of the land recovered.' Here the client is distinctly indemnified against costs by the counsel, and such a contract is no less champertous than one in which it is affirmatively provided that counsel shall stand the costs. 6 Cyc. p. 858 *et seq.*; 5 Am. & Eng. Enc. Law (2nd ed.) 829.

"It is urged by counsel against this construction, that the contract made the land recoverable liable for costs and charges, and that enough has already been recovered at that time (July 10, 1875) to answer this purpose. But the client was none the less indemnified against liability, and the land might prove

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inadequate for the purpose. This was sufficiently within the range of possibility to make the matter of the client's exemption the subject of an express stipulation. It appears that the land was wild mountain land, having only a speculative value, while the suits to be brought were of a kind attended with heavy expense. Moreover, if this contract is to be construed as having relation in date to the commencement of complainant's connection with Miss Hollingsworth as her counsel (as argued in his behalf), then at that time no land had been recovered, and the whole undertaking was at complainant's risk as to cost by the clause exempting Miss Hollingsworth from liability.

"Viewing Exhibit No. 4 again, from the standpoint of its own date (July 10, 1875), it binds Miss Hollingsworth to compensate General Roller with one-fifth of the lands, of all the 52,000 acres recovered or to be recovered. For what? Certainly not only for the services to be rendered in the future in connection with the unsettled controversies affecting those portions of the land then not yet recovered—aggregating about 25,000 acres—but manifestly in consideration of his services rendered and risks assumed under the contract of 1873, and in and about the recovery of the 26,575 acres which, on July 10, 1875, had already been recovered, and his services rendered and risks assumed under the provisions of the same contract in and about the proceedings looking to the recovery of those portions of the land which had not yet been recovered in 1875, as well as the services still to be rendered when Exhibit 4 was signed.

"A bond given for a fee due under a champertous contract is void, and so likewise is any other contract for such a consideration. Neither is the contract of July 10, 1875, severable so as to distinguish the valid from the illegal parts, even if it were held to be an independent contract without vice of its own, so far as future transactions were concerned. It would be impossible to determine to what extent the services rendered and the risks assumed by the complainant under the contract of 1873 operated as the consideration for the promise to pay him

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one-fifth of the lands yet unrecovered in 1875. The contract of 1875 is an entire thing, and the illegality of the original contract is inseparably a part of it. *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

"As a further argument against the demurrer, it is insisted by counsel for complainant that the demurrant, Mrs. Murray, is a stranger to the contract, and that a stranger to an illegal contract cannot set up the illegality as a defense.

"The abstract proposition of law, as stated, is doubtless correct, but I do not think the authorities sustain the application of the principle to the situation of this case. The rule applies *when the illegality does not appear* on plaintiff's own showing, but is brought into the case in an affirmative way by the defendant as matter of defence, as by plea or answer, or where the illegal contract is collateral to the matter in suit. When the illegal contract is the substance of his suit, and the illegality appears by the plaintiff's pleadings, and a demurrer is interposed, or the question is otherwise brought to the attention of the court, the law is, I think, that the illegality thus appearing will defeat the suit.

"The case of *Johnson v. Van Wyck*, 4 App. D. C. 294, 41 L. R. A. 520, decided by the District of Columbia Court of Appeals, is a learned and instructive authority on this question, and on pages 528 and 529 a number of eminent judges are quoted at length in support of the decision. The case of *Peck v. Heurich*, 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. 927, also illustrates the rule; and this result would seem to follow necessarily from the general principles of equity relative to illegal contracts. 2 Pom. Eq. Jur. (3rd ed.) secs. 936-939.

"If Miss Hollingsworth had conveyed the land to Mrs. Murray in consideration, or on condition, that she should pay to General Roller one-fifth of the proceeds realized on a sale of it, or that the grantee should hold a one-fifth interest as trustee for General Roller's use, Mrs. Murray could not have pleaded to a suit by General Roller to enforce the provisions of this deed

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for his benefit, that the benefit accruing to him under the deed was the result of a former champertous contract between General Roller and his grantor. In that case, he would rely upon the deed and the contract evidenced by it, and the consideration which moved Miss Hollingsworth to make these provisions would not appear, and Mrs. Murray would not be allowed to bring it in as an affirmative defense for the purpose of relieving herself from the obligation of a legal contract between herself and her grantor.

"I do not regard Mrs. Murray, however, as a stranger. On the contrary, she is a privy in estate to Miss Hollingsworth, her grantor, and a privy also to the contract with General Roller. The bills allege (original and amended) that Miss Hollingsworth made a deed of gift of the land to Mrs. Murray, the latter 'agreeing to carry out the contract' between complainant and Miss Hollingsworth. In Exhibit No. 52 with the supplemental bill, being a letter of November 18, 1892, to General Roller, Mrs. Murray says, that when Miss Hollingsworth deeded the land to her, it was with the distinct understanding that the contract with General Roller was to be 'as binding upon me' (Mrs. Murray) 'as it had been upon her,' (Miss Hollingsworth), and continues: 'I would suggest that you prepare a simple statement, showing that we stand in Miss Hollingsworth's place as regards the former contract, and we will submit such paper to Mr. McMurtrie for approval, and if he thinks it the thing for both sides, we will then sign it;' and in General Roller's reply of December 19, 1892, to Mrs. Murray (Exhibit No. 53) he says: 'You say that you have heretofore given me assurance that you had received the deed with the distinct understanding that my contract with Miss Emily should be as binding upon you as upon her. You are simply mistaken—such assurance would have been acceptable to me and would have satisfied me for a reasonable time, and perhaps until now, but what seemed a studied refusal on your part to acknowledge the fact in a formal way, was far from satisfactory. If you

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are to take the shoes (as we lawyers say) of Miss Emily Hollingsworth, all right.' It furthermore appears, that at the time of the conveyance to Mrs. Murray the litigation involved in the recovery of the land had not ended. The bill says this conveyance was made on or about April 1, 1889. In the letter of General Roller of December 19, 1892, (Ex. 53), after expressing his satisfaction for the present with Mrs. Murray's assurance as to his contract being as binding upon her as it was upon Miss Hollingsworth, he says: 'I shall at once push the Nelson case to trial, and when that is ended, shall demand a formal deed;' that is, the deed for the one-fifth interest he had repeatedly asked for. And in Mrs. Murray's letter to General Roller of November 18, 1892, (Ex. 52), she speaks of General Roller as her counsel, and makes inquiry about the Nelson case. It would seem, therefore, that Mrs. Murray is not only a privy in estate to Miss Hollingsworth, with the right to make any defense to General Roller's demand that Miss Hollingsworth could have made (*Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169, and notes), but that she expressly took over the contract to be bound as Miss Hollingsworth was, taking Miss Hollingsworth's shoes in the contract with General Roller's consent, and became his client, under the terms of the contract, before the litigation was ended.

"It is also urged on behalf of complainant, that, even if he cannot recover on the contracts alleged in his pleadings, he is entitled to recover reasonable compensation for his services on a *quantum meruit*.

"There are authorities both for and against this proposition, but the question is not one to be decided in this case. Any claim upon a *quantum meruit* is a legal demand, to be asserted at law. The doctrine that when a court of equity once acquires jurisdiction of a cause, it will do full justice between the parties, though, in doing so, it has to administer and decide rights properly pertaining to the common law jurisdiction, does not

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apply to the case of a bill which goes out of court on a demurrer for want of equity.

"It is incidentally mentioned as a matter of evidence in the amended and supplemental bill, and alluded to in the briefs for complainant, that General Roller obtained a deed of conveyance from Miss Hollingsworth for a one-fifth interest in a certain tract of 10,075 acres lying in West Virginia, part of the 52,000 acres; and that this deed was returned to Miss Hollingsworth for certain purposes and never returned to him.

"I do not understand that this circumstance is brought forward as an independent ground of relief as to the one-fifth interest in the particular land concerned. The pleadings are not framed with a view to relief on that account, and this court would be wanting in territorial jurisdiction.

"The court is of opinion to sustain the demurrer and dismiss the bills, and that the injunction heretofore awarded on the prayer of the amended and supplemental bill be dissolved."

When the opinion of the circuit court was rendered upon the demurrer to the amended and supplemental bill, appellant offered another amended and supplemental bill, which offer resulted in a re-argument of the cause, upon which the circuit court filed a second opinion, as follows:

"On the re-argument of this case, two grounds, not before advanced, were urged by the complainant to induce the court to change its decision. The first was, that the act of December 8, 1792, (1 Rev. Code, 1819, p. 538), defining the offense of champerty and prescribing its punishment, was repealed by its omission from the revision of 1849; and that the effect of this repeal by implication was not only to repeal the statute, but to repeal the common law, of which the statute is claimed to have been declaratory only; and, therefore, that there is no law against champerty in Virginia to-day. The opinion of Judge Tucker in *Gallego v. Attorney General*, 3 Leigh, 476, 24 Am. Dec. 650, is cited in support of this proposition.

"In that case Judge Tucker said that, if there was any com-



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mon law doctrine giving validity to indefinite charities, it was completely covered by the provisions of 43 Eliz.; and that, therefore, although it should be admitted that certain indefinite charities were recognized at common law, yet as the statute also comprehended them and was itself repealed, the common law was repealed *codem flatu* with the statute. None of the other judges touched upon this question, and it would seem from an examination of the whole case, that the decision of the court rested upon the proposition that the gift in question was void at common law, and not by reason of the repeal of the common law. Certainly, this has been the view taken of that decision by both courts and law-writers.

"In 2 Minor's Insts. (3rd ed.) p. 1056, it is said: 'In England very much more indulgence is manifested to indefinite charities than to other indefinite gifts and devises; and this diversity was long attributed not to the common law, of which some thought the statute of 43 Eliz. c. 4, merely declaratory. but to the terms of that statute, which most supposed to have introduced a new doctrine. *It was under this latter view of the law that the earlier Virginia cases (mentioning Gallego v. Attorney General, supra, and also Baptist Association v. Hart. 4 Wheat. 1, 4 L. Ed. 499), were adjudicated. But, upon an investigation of the ancient records in the Tower of London, it was discovered that in very many cases prior to the statute of 43 Eliz. c. 4, a similar discrimination in favor of charities had prevailed in equity, and that 43 Eliz. was little more than affirmatory of the common law. Virginia, notwithstanding this development of the mistake upon which her earlier cases had proceeded, yet did not think fit to recede from the doctrine these cases had established.*'

"This same view, as to the ground upon which the decision in *Gallego v. Attorney General, supra*, rested, was taken by the court of appeals in the case of *Fifield v. Van Wyck*, 94 Va. 570. 27 S. E. 446, 64 Am. St. Rep. 745; in the *Churchman case*, 80 Va. 718; and in the *Guthrie case*, 86 Va. 125, 10 S. E. 318.

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6 L. R. A. 321, and also by the Supreme Court of the United States, in *Vidal v. Girard*, 2 How. 127, 11 L. Ed. 205, and in *Russell v. Allen*, 107 U. S. 163, 27 L. Ed. 397, 2 Sup. Ct. 327.

"From all these authorities, and others that might be cited, the opinion is manifest that, but for the error which the Supreme Court of the United States fell into in the case of *Baptist Asso'n v. Hart*, *supra*, and which the court of appeals of Virginia fell into in *Gallego v. Attorney General*, *supra*, as to what was the common law, the decision of the latter case would have been different. In none of them is it conceded or considered that the repeal of 43 Eliz. would have operated a repeal of the common law with respect to indefinite charities.

"It may be true that the express repeal of a statute which is declaratory of the common law—which reduces the whole of the common law on a given subject to statutory form—would operate a repeal of the common law, but it would seem to be contrary to sound reason and to the usual rule of interpretation to allow that effect to an implied repeal of a statute arising out of the omission to embody the statute in a revision, and especially when the statute thus repealed was declaratory of the common law only in a partial sense. The act of 1792 relative to champerty is a penal statute. It defines a criminal offense and prescribes the punishment for it. In the sense that the offense it defines was champerty at common law and an offense at common law, the statute is declaratory of the common law; but it is not declaratory of the common law in the sense that it is a statutory expression of all the common law on the subject, for it modifies the common law and deals with only a branch of the subject. The statute is restrictive in its definition, narrowing the common law, for the sale of pretended titles, the buying of choses in action, and many other forms of interference not included in the statute were champertous at common law, though they may not have amounted to a criminal offense. The statute was strictly a penal one, defining a criminal offense, and fixing its punishment. Even if it be true that,

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by reason of the implied repeal of this statute, champerty is no longer a criminal offense in Virginia, which may fairly be regarded as doubtful, it would be an unwarranted extension of the doctrine of implied repeal to allow to the implied repeal of a criminal statute the effect of abrogating an important doctrine of the law of contracts as it existed at common law, exists now in nearly all the states of the Union, and has been supposed and held to exist in Virginia by the courts, the general assembly and the bar of the state.

"In the case of *Nickles v. Kane*, 82 Va. 312, the Supreme Court of Appeals of this state has distinctly declared that, whether the statute of 1792 be regarded as declaratory of the common law or as repealing the common law, the common law as to champerty with respect to the validity of contracts, is the law of Virginia to-day; and this I conceive to be both a true and a binding declaration of the law.

"The other proposition urged on the rehearing was that the contract in question is a Pennsylvania contract, to be governed as to its validity by the law of that state, and that the law of another state is a fact to be proven like other facts, and cannot be known to the court on a demurrer.

"I cannot agree that the contract is to be governed by the law of Pennsylvania. The champertous suits were to be brought in Virginia, and the law of this state governs the validity of the contract. Minor on Conf. Laws, p. 404.

"The case of *Blackwell v. Webster*, 29 Fed. Rep. 614, cited by counsel for complainant, on examination is found to have turned on the particular form of the Maine statute, and is easily distinguishable without conflict with the rule as stated by Mr. Minor. Indeed, Mr. Minor refers to the case and approves it. The contract in question in the case at bar is, moreover, a contract relating to real estate, and it is well settled that such contracts are governed by the *lex loci rei sitae*. 3 Minor's Insts., 144.

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“With respect to the amendments tendered by complainant, the court is of opinion to reject them. The bill has been amended twice already, and after these amendments, and after a thorough argument of the case on its merits, the court announced its decision. A due regard to the orderly procedure of the court and the rights of the opposing party require that some limit be set to the privilege of amendment. The amendments now presented are offered without explanation or excuse, and in the main are unsubstantial, and would not change the opinion of the court on the merits of the case.

“Paragraph No. 1 sets out that before the original contract between complainant and Miss Hollingsworth was made, it was understood and agreed that a compromise could be and was to be affected with the adverse claimants of 13,800 acres of the land in dispute, and that these adverse claimants had been advised by their counsel that their title was worthless, and that the agent of Miss Hollingsworth was so advised by complainant; and, further, that such a compromise would have furnished sufficient property belonging to Miss Hollingsworth to provide for the payment of costs. This was prior to the contract between General Roller and Miss Hollingsworth, and not a part of that contract. Whatever may have been the expectation as to the ease with which these adverse claimants might be induced to abandon their claims, they had not in fact been settled at the time the complainant's contract of employment was entered into, and that contract dealt with all the 52,000 acres in dispute, and looked to its recovery, and stipulated for the payment of costs by the counsel. The bill and the first amended bill allege that the complainant, acting under and in pursuance of his contract aforesaid, and for the compensation then stipulated, proceeded to and did, by actions and otherwise, recover the whole of the 52,000 acres of land which was the subject of the contract, and this, indeed, is the basis of the present suit.

“Paragraph 4 of the amendments alleges that Miss Hollings-

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worth conveyed to Mrs. Murray upon the consideration and condition that the grantee should pay to General Roller one-fifth of the proceeds to be realized on a sale of the property. I take this to be but a variation of the phraseology of the former pleadings, the facts being set out in the former bills, while in this amendment they are pleaded according to their legal effect as conceived by counsel. This view is fully verified by the brief filed by complainant himself, and by his oral argument, and by the brief of his counsel also; in all of which it was insisted that Mrs. Murray, in consideration of the conveyance to her, undertook to carry out the contract of Miss Hollingsworth with General Roller, and that the only contract that she had knowledge of was the contract of 1875, and that the contract of 1875 was, therefore, the one as to which she undertook to stand in Miss Hollingsworth's place and to carry out. The views of the court on this question are fully set out in its former opinion, and it sees no reason to change them. The other amendments offered are mere amplifications of the former pleadings and would not affect the result.

"The conveyance at one time by Miss Hollingsworth to General Roller of a one-fifth interest in a certain portion of the lands lying in West Virginia, the deed for which was afterwards returned to her, is urged as a reason why the court should retain jurisdiction and grant relief as to that portion of the land; but this is a suit to enforce the sale of the land under the Wheelock deed of trust, and this court cannot decree the sale of land lying in West Virginia, even if such relief would be proper under the other facts of the case.

"The case of *Brown v. Bigne*, 21 Ore. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745, quoted in *Johnson v. Van Wyck*, *supra*, has been much relied on by counsel for complainant in the argument of what constitutes a champertous contract, but I do not think it sustains their position. In that case Bigne was engaged in a necessary and meritorious suit, al-

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ready begun, and found himself, pending the suit, without means to prosecute it further, and thereafter he entered into a contract with Brown by which the latter furnished the funds to carry on the suit already begun to a termination for a share of the proceeds. The court upheld the contract under the circumstances of the case, but said: 'When such contracts are made for the purpose of \* \* \* inducing suits to be begun which otherwise would not be commenced \* \* \* they come within the principles and analogy of that doctrine, and should not be enforced.' 41 L. R. A. 526.

"A decree can be drawn denying leave to file the amendments offered, sustaining the demurrer of Mrs. Murray, and also that filed by the Pocahontas Co. and the Chesapeake Western Co., which was filed after the former opinion of the court was announced (sustaining the latter demurrer *pro forma*), and dismissing the bills; and also dissolving the injunction formerly awarded."

For the reasons given by the circuit court, we are of opinion that its decree should be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.**

SMITH v. LURTY

AND

LURTY v. SMITH.

November 21, 1907.

Absent, Cardwell, J.

1. **ADMINISTRATION—Right of Widow to Qualify—Refusal—Designation of Another—Code, Sec. 2639.**—A widow, though otherwise entitled to the preferable right to qualify as administratrix with the will annexed of her husband, is properly refused the right to qualify where it appears that she is hostile to, and not on speaking terms with, the principal devisee and legatee under the will, is litigating with the curator of her husband's estate, and is asserting title to property which the husband attempted to dispose of by his will; nor, having been refused the right to qualify, can she designate the person to be appointed. Section 2639 of the Code does not confer this right upon her under such circumstances.
2. **ADMINISTRATION—Right to Qualify—Distributees—Legatees—Code, Sections 2637 and 2639.**—When the executor of a will refuses to qualify, the right of administration is conferred upon the decedent's distributees by sections 2637 and 2639 of the Code, and they are allowed to waive it in favor of any other person to be designated by them; and, when the distributees have designated such a person, a legatee and devisee who is not a distributee has no right to qualify or to designate who shall. The word "distributees," as used in section 2639, means those who would be entitled under the statute of distribution to the personal estate of the decedent if he had died intestate, and does not embrace legatees and devisees. But distributees who recognize the preferable right of the widow to qualify, if the court deems her a proper person, do not thereby waive their right to qualify, or to designate who shall, in the event the court denies the application of the widow to qualify.

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Opinion.

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Error to a judgment of the Circuit Court of Rockingham county, appointing an administrator with the will annexed of Warren S. Lurty, deceased.

*Affirmed.*

*E. B. Crawford* and *D. O. Deckert*, for Susie Smith.

*A. B. Guigon* and *Conrad & Conrad*, for Annie S. Lurty.

*Sipe & Harris*, for next of kin of W. S. Lurty, deceased.

BUCHANAN, J., delivered the opinion of the court.

Warren S. Lurty died leaving a paper purporting to be his last will and testament, by which he disposed of a part of his real and personal estate. Pending litigation as to whether or not that paper was his last will, a curator was agreed upon by the parties in interest and appointed by the court. The result of the litigation was the establishment of the paper as the decedent's last will. The executor named therein qualified, but before acting was permitted to resign. Thereupon, the widow moved the court to grant her letters of administration with the will annexed, and in case it denied that motion then in the alternative that letters of administration be granted to her nominee, whom she was ready to announce to the court.

That motion was opposed by Susie Smith, a devisee and legatee under the will, who moved the court to grant administration to H. W. Bertram, who was in charge of the estate as curator. The brothers and sister of the testator (he having died leaving no descendants), without opposing the claim of the widow to a prior or preferred right to have administration granted herself, moved the court to grant letters of administration to the husband of the testator's sister, in case the applica-



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tion of the widow for grant of administration to herself should be denied.

Upon the hearing of these motions, which were heard together, the court overruled the motions of the widow and Susie Smith, respectively, sustained the motion of the brothers and sister of the testator, and appointed the husband of the latter administrator with the will annexed. To that order the widow and Miss Smith each obtained a writ of error and supersedeas.

By section 2637 of the Code of 1904 it is provided, that "If there be no executor appointed by the will, or if all the executors therein named refuse the executorship, or fail when requested to give such bond, which shall amount to such refusal, the said court or clerk may grant administration, with the will annexed, to the person who would have been entitled to administration if there had been no will, upon his taking such oath and giving such bond."

By section 2639 it is provided, that where a person dies intestate, "administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such of the others entitled to distribution as the court or clerk shall see fit. But any of the said distributees may, at any time waive the right to qualify in favor of any other person to be designated by them. If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors, or to any other person."

Conceding that the widow, under these sections of the code, if she was a suitable person, had the preferable right to qualify as administrator of her husband with the will annexed, the court did not err in refusing to allow her to do so upon the facts disclosed by the record. She was very hostile to and not upon speaking terms with Miss Smith, the principal devisee and legatee under the will. She was litigating with the curator, both as plaintiff and defendant, and was asserting title to

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property which her husband had attempted to dispose of by his will. Under these circumstances, the circuit court properly declined to appoint her as administratrix. See *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580; 18 Cyc. 93, and cases cited.

Neither do we think the circuit court erred in refusing to appoint as administrator the person she proposed to name in the event the court refused to appoint her. The statute provides that any distributee may waive his right to qualify in favor of any other person to be designated by such distributee; but we do not understand it to mean that, where a distributee has insisted upon his right to qualify and the court has held, upon the facts disclosed in the proceeding, that he has no such right, he can then designate some other person to be appointed to a position which he himself has been adjudged not entitled to.

Neither do we think the court erred in refusing to sustain the motion of Miss Smith to appoint Bertram, the curator, as administrator. Section 2637 of the code provides that, where the executor refuses the executorship, the court or clerk may grant administration with the will annexed to the person who would have been entitled to administration if there had been no will; and section 2639 provides, where there is no will, that administration shall be granted to the distributees, and that any of the distributees may at any time waive their right to qualify in favor of any other person to be designated by them. Miss Smith, while a devisee and legatee under the will, was not a distributee, for the word "distributees," as used in the sections quoted, clearly means those who would be entitled under the statute of distribution to the personal estate of the decedent if he had died intestate. Not being a distributee, she had no preferable claim to be appointed administrator, nor preferable right to designate another to be so appointed under the statute.

The brothers and sister of the decedent, by their recognition of the prior right of the widow to qualify if the court thought

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she was a suitable person under the facts of the case, neither waived their own right, respectively, to qualify, nor their right to designate another person in the event the court declined to grant letters of administration to the widow. They were interested in the decedent's estate, were clearly within the meaning of the statute, and the court did not err in granting letters of administration to the person designated by them, under the facts of the case.

Its order must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## SOUTHERN RAILWAY CO. v. SMITH.

November 21, 1907.

Absent, Cardwell, J.

1. **RAILROADS—Fellow Servants—Yard Master and Engineer—Former Law.**—A yard master of a railroad company, who had no power to employ or discharge servants, but who directed the movements of trains on the yard, the shifting and changing of cars and the making up of trains, and who possessed none of the powers of a vice-principal, was a fellow servant of an engineer running an engine on the yard as the law stood prior to the adoption of the present constitution.
2. **RAILROADS—Fellow Servants—Yard Master and Engineer—Present Law.**—The present constitution has abolished the fellow-servant doctrine in cases like that stated in paragraph 1 above, and the company is liable for an injury inflicted on a yard master through the negligence of the engineer.
3. **RAILROADS—Fellow Servants—Constitutional Provision—Yard Master Riding on Switching Engine—"Requiring."**—If the presence of a yard master on a switching engine is in the usual and proper discharge of his duties, he is rightfully there, and is entitled to the benefit of the protection afforded him by the constitutional provision abolishing the fellow-servant doctrine as to every employee engaged in any service requiring his presence on a train, car or engine. The word "requiring" will not be given such a restrictive meaning as to exclude employees of this class.
4. **VERDICTS—Excessive Damages.**—The verdict of a jury will not be set aside as excessive unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case.

Error to a judgment of the Circuit Court of Amherst county  
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in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Horsley, Kemp & Easley*, for the plaintiff in error.

*Lee & Howard*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This writ of error brings up for review the proceedings in an action, brought by the defendant in error, to recover damages for a personal injury alleged to have been occasioned him by the negligence of the plaintiff in error. There was a verdict and judgment in favor of the plaintiff for \$15,000, which we are asked to reverse and set aside.

The essential facts established by the record are that the plaintiff was in the employment of the defendant railroad company as yard foreman and station agent at Monroe, a division terminal, in Amherst county. His duties required him to superintend generally the operations in the yard, and among other things to go from point to point therein, switching cars, making up trains, and getting them in and out of the yard. In the discharge of these constantly recurring duties, in an extensive yard, it was customary and necessary for the plaintiff to ride from point to point on the switching engine. He had been engaged with duties of this character on the evening of the accident, and was returning from the performance of his work in the direction of the yard office, standing, as was his custom, on the step of the engine, holding to the handholes placed there for the purpose with both hands. The position of the plaintiff on the step of the engine was within two feet of the engineman, who was then and there directed by the plaintiff as to the next

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point to take the engine, and further told to slow up as he passed the office, in order that the plaintiff might get off for the purpose of discharging certain duties there that demanded his attention. As the office was approached, the engineman, with full knowledge of the plaintiff's position, applied the steam in such manner as to cause the engine to suddenly and violently lunge forward, in an unusual and dangerous manner, thereby throwing the plaintiff to the ground and under the wheels of the engine, which crushed and destroyed his arm.

We are of opinion that the negligence of the defendant company is clearly established, and that the evidence is quite sufficient to justify the conclusion of the jury that the plaintiff was not guilty of contributory negligence.

The assignment of error chiefly relied on involves the relation existing at the time of the accident between the plaintiff and the engineer. The theory of the plaintiff, which was adopted by the trial court, is that, at the time of the commission of the negligent act complained of, he was a fellow servant of the engineer with the same right to recover of the defendant that he would have had if such negligent act had been that of the defendant company itself in the performance of a non-assignable duty; it being insisted on behalf of the plaintiff that he comes within the provisions of section 162 of the constitution, which abolishes the doctrine of fellow servant as to certain classes of railroad employees, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omission of any other servant or servants of the common master.

The contention of the defendant company is, that the presence of the plaintiff on the engine was not *required* by the services in which he was engaged when injured, and, therefore, that the company is not liable, although the injury was inflicted by the negligence of the engineer. It is further contended on behalf of the railway company that the plaintiff was not a fellow servant of the engineer, but that, as yard foreman and station

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agent, he occupied the master's position as to the engineer, who was an inferior servant; and that as such vice-principal, claiming for injury from his subordinate's act, the defense of assumed risk is not intended to be touched by section 162 of the constitution.

Omitting such parts of section 162 of the constitution as do not apply to this case, it reads as follows: "The doctrine of fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is \* \* \* abolished as to every employee engaged \* \* \* in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master that a servant would have \* \* \* if such acts or omissions were those of the master himself, in the performance of a non-assignable duty; provided the injury so suffered by such railroad employee result from the negligence of \* \* \* a co-employee engaged in another department of labor \* \* \* or who is in charge of any switch, signal point, or locomotive engine."

The language "every employee engaged \* \* \* in any service requiring his presence on a train, car or engine," manifestly means every one who may be there in the line of duty. We cannot pick out the single word "requiring" and attach to it the restrictive meaning contended for by the railway company. This would exclude from the benefits of the constitutional provision every employee except those actually engaged in the operation of the engine, although the presence there of some other might be in the line of a reasonable and proper discharge of his duty. If his presence on the engine is in the usual and proper discharge of his duty, he is rightfully there, and is entitled to the benefit of the protection afforded him by the constitution.

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Looked at from the standpoint of a demurrer to the evidence, as this record must be, the undisputed facts are that the duties of the yard foreman required him to accompany and ride upon the yard engine from one point to another in the yard; that it was both proper and customary for him to ride on the engine, as he was doing at the time of the accident; that his position on the step of the engine was not only a reasonably safe place, but that it was the place at which it was usual, customary and proper for him to be. There is no denial that the plaintiff had so interpreted the requirements of his position for years, and it does not appear that the railway company expected such duties to be discharged in any other way.

As to the contention that the yard foreman and the engineer were not fellow servants, under the law as it was prior to the date on which the constitution of 1902 became effective, it clearly appears that the yard foreman had no authority or power over the yard engineer, except to direct him when and where to move his engine in shifting and transferring cars on the yard. He possessed none of the power of a vice-principal, such as the right of selection, employment or discharge of the engineer, or any authority over him in the operation of the engine. He could only direct his movements on the yard as any other foreman or boss could do. If the engineer disobeyed or was for any reason unsatisfactory, the yard master could only report him to a common superintendent for his action.

All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence. *Donnelly's Admr. v. N. & W. Ry. Co.*, 88 Va. 853, 14 S. E. 692.

In the case of *N. & W. Ry. Co. v. Nuckols*, 91 Va., on p. 207, 21 S. E. 347, the principle is succinctly stated as follows: "The liability does not depend upon the fact that the servant injured



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may be in a different department of the service from the wrongdoer. The test is, were the departments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employees of the different departments. If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department. The liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal."

In the case of *Richmond Locomotive Works v. Ford*, 94 Va. 543, 27 S. E. 511, this court says: "Where the execution of work directed to be done by the master or his representative is entrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss or foreman to see to the execution of such work. This sort of superiority of service, as has been said, is so essential and so universal that every workman in entering upon a contract of service must contemplate its being made in a proper case. He, therefore, makes his contract of service in contemplation of the risk of injury from the negligence of any other fellow workman. The foreman or superior servant stands to him in that respect in the precise position of his other fellow servant."

In the case of *N. & W. Ry. Co. v. Houchins*, 95 Va. 404, 28 S. E. 580, 60 Am. St. Rep. 791, 46 L. R. A. 359, this court says: "And the mere fact that another engaged in the same work or employment is, by the rules of the master for the direction and government of those in his employ, made a leader, boss or conductor, or by whatever name he might be designated or known, to see to the execution of the work, and by the neglect of this leader, boss or conductor, one engaged in the same common work of the master is injured, does not, of itself, place the one so put in authority in the category of principal

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or vice-principal." And again, on page 406, it is said: "The running of trains by a railroad company is work of such a character as to make it essential that one of the crew on each train be selected as a leader, boss or conductor, as he is always known, to direct the execution of the work, and this kind of superiority it may be said, is as essential and universal in the moving of trains upon a railroad, as in other pursuits when the employees work in squads, gangs or crews. Every man, in entering upon a contract of service upon a train, as fireman, engineer or brakeman, must contemplate its being run under the orders and direction of a conductor, who, though designated as conductor, with authority to control and direct the men under him, is but a co-laborer, or co-workman, with the other members of the crew engaged in a work of mere operation, a common employment, under one and the same common employer, from whom all derive their authority and compensation." See also *Moore Line Co. v. Richardson*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 755; *Eckles v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349.

In view of the evidence in this case, and under the law as it was when the present constitution became effective, as shown by the authorities cited, the relation existing between the yard foreman and the yard engineer in question was that of fellow servant.

The presence of the plaintiff in this case being, as we have seen, required upon the yard engine at the time of the accident, and the relation existing between himself and the engineer being that of fellow servants, he comes clearly within the protection afforded such an employee by the provisions of section 162 of the constitution, which abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master. This provision of the

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constitution makes no distinction between superior and inferior servants. The language is, "abolished as to every employee of a railroad company engaged in any service requiring his presence upon an engine; and every such employee shall have the same right to recover," etc.

These considerations dispose of the material questions raised by the exceptions taken to the action of the circuit court in giving and refusing instructions. The instructions given conform to the view of the law herein expressed, and submit the case to the jury without prejudice to the rights of the plaintiff in error.

It is further assigned as error that the verdict is excessive.

It is true that \$15,000 is a larger verdict than we usually encounter as an award of damages for the loss of an arm; but this furnishes no warrant for our interference with the finding. The question to be considered is not, whether this court, if acting in the place of the jury, would give more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, some gross error, or misconception of the subject. There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is, therefore, the established rule, settled by numerous decisions extending from *Farish & Co. v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666, to the recent case of *N. & W. Ry. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. The record in the case at bar furnishes no suggestion that the jury were influenced by partiality or prejudice, or by any misconception of the merits of the case; nor is there anything to indicate that

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they were not moved to their conclusion from a sense of right and justice.

The circuit court did not err in refusing to set the verdict aside, and its judgment must be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.**

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## TIDEWATER RAILWAY CO. v. SHARTZER.

November 21, 1907.

Absent, Buchanan, J.

1. **EMINENT DOMAIN—Property “Damaged”—Constitutional Provision—Legislative Power.**—Under a constitutional provision forbidding the Legislature to pass any law whereby private property may be taken “or damaged,” without just compensation, the Legislature has full power to require any company exercising the power of eminent domain to make compensation to any person whose property is damaged by the proposed improvement, whether any portion of the property is actually taken or not. The Legislature has full legislative power, except so far as restrained by the constitution expressly, or by necessary implication.
2. **EMINENT DOMAIN—What Constitutes “Damage.”**—The constitutional inhibition against taking or damaging private property for a public use without making just compensation therefor, and the statute passed in pursuance thereof, embrace and give a remedy for every physical injury to property, whether by noise, smoke, gases, vibration or otherwise, and every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, causing special pecuniary damage to the owner, for which an action would lie at common law. There need be no physical invasion of the owner's real property, but the owner may recover if the construction and operation of the improvement would amount to a private nuisance at common law, or is the cause of substantial damage, though consequential.
3. **EMINENT DOMAIN—“Damage” by Smoke, Noise, Etc., of Railroads.**—Where the use and operation of a railroad will depreciate the market value of property by reason of the smoke, noise, dust and cinders arising from the ordinary and lawful operation of the road, the property is “damaged” within the meaning of the constitution and the statute passed in pursuance thereof, and the owner of such property is entitled to compensation.

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## 4. EMINENT DOMAIN—"Damage" to Property—Multiplicity of Claims.—

The fact that the constitutional guaranty of compensation for property "damaged" will give rise to an infinite number of claims, is no valid objection to its enforcement. The right to compensation is co-extensive with the damage or injury, both in space and in amount. No arbitrary rule on the subject can be laid down, but it will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case, whether or not there has been such damage to property as should be compensated.

Error to a judgment of the Circuit Court of Roanoke county in a proceeding to condemn land. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Robertson, Hall & Woods* and *F. W. Christian*, for the plaintiff in error.

*Archer A. Phlegar* and *McClung & McClung*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Upon the motion of the Tidewater Railway Company, the circuit court of the county of Roanoke appointed commissioners to ascertain what would be a just compensation for "such part of the land, of the freehold whereof Jeremiah Shartzer is tenant, and for such other property as is proposed to be taken by the Tidewater Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said tenant or owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works."

So much of their report as we are concerned with is as fol-

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lows: "To the lands of Julia A. Shartzter, no part of whose land is taken: Damages to dwelling, land and business conducted thereon, for annoyance from smoke, noise, dust, cinders and danger from fire resulting from the construction and operation of the road in a lawful manner, \$600.00. We did not allow anything to Julia A. Shartzter for damages for interference with means of access to her property, as we do not think she is damaged in this respect."

The Tidewater Railway Company excepted to this report as to the allowance made to Julia A. Shartzter; and, thereupon, "The court being of opinion to sustain the exceptions and recommit the said report on account of the form thereof, and because the same included damages to the business of the said Julia A. Shartzter, by consent of parties, it is agreed that the said report be amended and treated as if it read as to her property as follows: 'To the lands of Julia A. Shartzter, no part of which are taken, we fix the damages at the sum of \$600, and in ascertaining said damages, we took into consideration the proximity thereof to the said railroad, and find that the difference in the market value of said property before the construction and operation of said railroad, and afterwards, will be the sum of \$600, and that said depreciation in said market value and consequential damages to said property will be caused by smoke, noise, dust and cinders arising from the proper, ordinary and lawful operation of said road.'"

To the report as amended by this decree the applicant again excepted, and on consideration of the said exception, it was overruled by the court, and the report, as amended, confirmed. From that order a writ of error was allowed by one of the judges of this court.

The specific constitutional provision upon the subject of taking property for public uses, as it existed prior to 1902, is found in the constitution of 1869, Art. 5, sec. 14, which reads as follows: "The general assembly shall not pass \* \* \*

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any law whereby private property shall be taken for public uses without just compensation."

It was uniformly held, under that provision and the statute which carried it into execution, that there could be no recovery for an injury or damage to property, no part of which was actually taken. This construction resulted in much hardship, and was a denial of justice in cases where the use, the enjoyment and the value of property were greatly impaired under conditions which were held not to amount to a taking within the meaning of the law, as it then existed.

Influenced by these considerations, the convention which framed the constitution of 1902, amended sec. 14, Art. 5, which now appears as section 58, Art. 4, of the constitution of 1902, by which is prescribed certain prohibitions on the powers of the general assembly, and among them that "it shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation;" and the general assembly, when it came to legislate upon the subject and give effect to this constitutional provision, in section 1105f, cl. 5, provided, where a corporation authorized to have land condemned for its uses has complied with the requirements of the preceding section, for the "appointment of commissioners to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works."

With respect to the statute, we shall first observe that if the constitution of the state were to be construed as a grant of power to the Legislature, the statute just quoted could be maintained as being a reasonable and proper exercise by the legislature of the delegated power. But such is not the rule of construction,



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as applied to the constitution of the state. The Legislature is clothed with full legislative authority, except so far as it is restrained by some provision of the constitution, either expressed or necessarily to be implied from the terms of that instrument. When, therefore, the constitution says that the legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, a statute which declares that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for the land or other property proposed to be condemned for its uses and damages, if any, resulting to the adjacent or other property of the owner, but also for damages to the property of any other person, is within the legitimate scope of the legislative power.

Coming then, to a consideration of the statute, it cannot be doubted that, by the change of the law in the constitution and statute, it was plainly intended to enlarge the right to compensation.

"Of this," says Lewis on Eminent Domain, at sec. 232, speaking of similar amendments, there can be no question. Any other construction would render the words nugatory. They are an extension of the common provision for the protection of private property. The words, injured or destroyed, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation. The supreme court of the United States, referring to the constitution of Illinois, says: "The use of the word "damaged" in the clause providing for compensation to the owners of private property appropriated to public use, could have been used with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870 gave no additional or greater security to private

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property sought to be appropriated to public use than was guaranteed by the former constitution.'” Lewis on Em. Dom. (2nd ed.), Vol. 1, sec. 232, and authorities there cited.

The same author says: “The words in question should be liberally construed. The provisions of the constitution requiring compensation to be made for property taken, injured or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. The language of the constitution is to be construed liberally so as to carry out and not defeat the purpose for which it was adopted.” Sec. 232a.

It will be observed that in the discussion of this subject, text-writers and adjudicated cases use the words, “damaged,” “injured” and “injuriously affected” as being equivalents and meaning in substance the same thing.

Considering the terms of the constitution and of the statute, as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing constitution and code are not difficult of interpretation, and should be held to embrace and give a remedy for every “physical injury to property, whether by noise, smoke, gases, vibrations or otherwise.” Lewis on Em. Dom., sec. 236.

It is contended on the part of plaintiff in error that “the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words ‘or damaged’ mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be caused by the physical invasion of property or an in-

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terference with some right, public or private, appurtenant to the property."

To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim, that he must enjoy it in such a manner as not to injure that of another; or, less literally but more accurately perhaps, "So use your own property as not to injure the rights of another." Broom's Leg. Max. (7th ed.), p. 364.

But in the case before us, the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its "inability to agree on terms of purchase with those entitled" to the land it desired, and, therefore, had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised.

It appears that the language of our constitution was taken from that of Illinois, which was adopted in 1870, and had been the subject of judicial construction by the courts of that state and of the United States.

In *Rigney v. City of Chicago*, 102 Ill. 64, the city had constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first-named street from the plaintiff's house and lot over and along the street intersected, except by means of a pair of stairs, whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value, by reason of being deprived of such access. It was held that the city was liable in damages for the injury, and in the discussion of the case rights as they existed under the constitution of 1848 and those rights as extended by the constitution of 1870 are compared, the court saying: "The restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the

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constitution of 1848, which simply provided that private property should not 'be taken or applied to public use,' without just compensation, etc. The constitution of 1870, however, provides that 'private property shall not be taken or damaged for public use without just compensation,' thus affording redress in cases not provided for by the constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action."

In *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511, the court observes: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney v. Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our constitution. The conclusion there reached was that, under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character—that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question."

The Supreme Court of the United States, in *Chicago v. Taylor*, 125 U. S. 161, 31 L. Ed. 638, 8 Sup. St. 820, referring to the Illinois cases, says: "We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that ex-

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pressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former constitution."

In *Baker v. Boston Elevated Ry. Co.*, 183 Mass. 178, 66 N. E. 711, it is held, that under statutes 1894, ch. 548, sec. 8, providing for compensation for damage caused by the construction, maintenance or operation of the lines of the Boston Elevated Railway Company, "noise which operating with other causes would constitute a private nuisance to abutting property, if it were not authorized, is special and peculiar damage, for the whole of which compensation can be recovered, without seeking to determine how much of the effect is due to that part of the noise which alone would not constitute a liability and how much to the excess." In the course of its opinion, the court in that case says: "In dealing with the question which is presented, we have a helpful analogy in the rules of common law. Noise is necessarily incident to the transaction of many kinds of business, and so long as it is not excessive, it is not unlawful. But when it is so great as to become a nuisance to property in the vicinity, it is actionable. It is judged by its effect, and not merely by its cause. In England, the difference in effect between damage which, as between private persons would give a right of action for a nuisance, and that which is permissible in the use of land, is often treated as an important consideration, if not an absolute test, in deciding what shall be paid for by a corporation acting under public authority. \* \* \* Disturbance which constitutes a private nuisance may be treated as causing damage different in kind, and not merely in degree, from that caused by disturbance which falls short of being a nuisance. Damage from noise which is unlawful by reason of its excess may well be considered unlike the detriment which is

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so slight as to be legally permissible in the ordinary use of property.

"In the case at bar it is found that but for the statutory authority the noise 'would constitute a private nuisance of a grave character to the petitioner's said estate.' At common law, in such a case, the rights of the owner of the property affected, and his relations to the cause of the disturbance, are treated as very different from those of the general public who are also affected by it, and he is entitled to compensation in damages. We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damage under this statute, which entitles the land-owner to compensation."

In *Swift & Co. v. Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404, this court said: "Where private property has been simply damaged by a public improvement, but no part thereof has been taken, the measure of damages is the diminution in the value of the property by reason of the improvement—difference between the fair market value of the property immediately before and after the construction of the public improvement."

But, as was said by the Supreme Court of California, in *Eachus v. Los Angeles Consol. El. R. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, quoted with approval by Lewis on Em. Dom., sec. 236: "The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered

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intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

"A recovery has not been allowed," says Lewis on Em. Dom., same section, "in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement, afforded no ground for redress."

No question is raised in this case as to the amount of damages allowed. The sole question is whether or not the depreciation in market value and consequential damages to property, caused by smoke, noise, dust and cinders, arising from the ordinary and lawful operation of a railroad, are the subject of compensation, under the provisions of our constitution and laws.

"The operation of a railroad," says Lewis on Em. Dom., sec. 230, "the switching of cars to and fro, the use of coal bins, stock yards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or

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when a railroad is laid in a street or highway. In the latter case, the annoyances referred to are mere incidents to what is in law the main grievance. But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking, we have already considered. But whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent constitutions. Where the use and operation of a railroad \* \* \* depreciates the value of property by reason of the noise, smoke, vibration, etc., his property is damaged within the constitution and he is entitled to compensation."

Such being, as we think, the proper interpretation of the constitution, the thought at once arises, that it will give rise to an indefinite number of claims. We cannot state this proposition more satisfactorily than is done by the author from whom we have already quoted so extensively.

In Sec. 227, Lewis on Em. Dom., it is said, of this contention, that it is without merit. "The constitution guarantees compensation for property damaged or injured for public use. The right to compensation is co-extensive with the damage or injury, both in space and in amount. This point was fully considered in the McCarthy case (*McCarthy v. Metropolitan Bd. of Wks.*, L. R. 8 C. P. 191), and in reference to it Justice Bramwell says: 'If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles away, if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there



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were one thousand claims of one thousand pounds each. If they are well founded, one million pounds of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?"

Lord Penzance, in the same case, observes: "It was asked in argument, where are the claims to compensation to stop, if the rule is so applied? The answer, I think, is that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attaches to the premises in question by reason of their proximity to, or relative position with the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy." That case dealt with the obstruction of a highway, but its reasoning applies as well to the diminution in value occasioned by smoke, noise, dust and cinders.

It is impossible to lay down any arbitrary rule upon the subject—certainly none based upon mere measurements. It will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case whether or not there has been such damage to property as should be compensated. Of course, claims without merit will be preferred, but it will be the duty of those entrusted with the administration of the law—commissioners, juries and courts—to separate

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those deserving of compensation from those which are without merit.

For these reasons we are of opinion that there is no error in the judgment of the circuit court, and it is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## TROUT v. NORFOLK &amp; WESTERN RAILWAY CO.

November 21, 1907.

1. **PAROL EVIDENCE—Deed in fee—Consideration—Parol agreement to Provide Right of Way.**—A land owner who has conveyed to a railroad company a fee simple, unencumbered, title to a strip of land, with covenants against encumbrances and for quiet enjoyment, will not be permitted to show, as a part of the consideration for the deed, a prior or contemporaneous parol agreement on the part of the company to construct a private right of way over the land conveyed, under the company's track, as a passway for his cattle. This would be, in effect, the reservation of an easement of the right of way, or a covenant to provide it, and parol evidence is not admissible to add any covenant to a deed, or to enlarge or contradict any covenant, or to create a reservation.
2. **PAROL EVIDENCE TO VARY LEGAL IMPORT OF DEED.**—In an action to recover the consideration of a deed, the consideration actually paid or promised can be shown by parol to have been other than that recited in the deed, or the fact of the payment of the consideration agreed may be contradicted, but parol evidence is inadmissible to alter or contradict the legal import of a deed. The legal import of a deed can no more be contradicted by parol evidence than its actual expressions.

Error to a judgment of the Circuit Court of the city of Roanoke in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

Waller R. Staples, for the plaintiff in error.

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*Robertson & Wingfield, Theodore W. Reath and Phlegar & Powell*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is an action of assumpsit in which the plaintiff claims the right to recover the value of certain real estate which he had conveyed to the defendant company.

The declaration contains the common counts in assumpsit, and two special counts. The first special count alleges that the plaintiff agreed to convey to the defendant certain parts of a tract of land, provided the defendant would pay him the sum of \$2,999 in cash, and would also construct, open and maintain across the land to be conveyed and under the defendant's railway tracks a roadway thirty feet wide, of which twenty-four feet was to be dedicated to the public use, and six feet to the plaintiff as a means of access for his live stock from one side of his place to the other; that he did convey the land, by a deed which he makes a part of the count, and received the \$2,999; but that the defendant refused to provide the six-foot passway for his use, whereby he is deprived of access to water for his stock, and has suffered damages in the sum of \$2,000. The second special count is practically the same as the first, except that it omits the statement that part of the roadway was to be dedicated to the public, and both counts claim that, in addition to the consideration agreed to be paid in money there was the further consideration for the said deed of the promise and agreement on the part of the defendant, that it would construct and maintain the six-foot passageway across the land conveyed and under the defendant's railway tracks for the use of the plaintiff as a means of access for his live stock from one side of his place to the other; and both allege the breach of the contract or agreement of the defendant to construct said passageway.

The defendant pleaded non-assumpsit, and at the trial the

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plaintiff was introduced as a witness on his own behalf, described the location of his tract of land, testified that he entered into a contract with the defendant for the sale of a portion of that tract; then introduced the deed made a part of the declaration, and proposed to testify that the contract between him and the defendant was that, if he would convey eleven and a fraction acres of land more than he had formerly agreed to convey, defendant would, for the additional land provide him a cattle-pass as stated in the declaration. To the introduction of this parol evidence the defendant objected, which objection was sustained by the court, and the plaintiff excepted to the ruling and tendered his first bill of exception, which was duly signed and made a part of the record. The plaintiff was then permitted to state, with the understanding that the defendant could move to exclude the statement, that the defendant was, in addition to the \$2,999 mentioned in the deed, to give him a passway along the culvert to be built over the county road for a cattle-pass from one side to the other of his land, and that such passway was to be through the land conveyed by the deed. On the motion of the defendant, this evidence was excluded, and to this ruling the plaintiff also excepted and took his second bill of exception. Thereupon, the plaintiff offered a letter written by his attorneys to the chief engineer of the defendant, his reply thereto, and a letter from Theo. Low, who signs himself "Real Estate Agent" to said chief engineer, which on defendant's objection were excluded, and the plaintiff took his third bill of exception.

The verdict was then rendered for the defendant, motion to set it aside was overruled, and the plaintiff filed his fourth bill of exception; whereupon, judgment was rendered for the defendant, to which judgment this writ of error was awarded.

The four bills of exception may be considered together, and the underlying question in the case is whether or not the court

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erred in excluding the evidence offered by the plaintiff, above mentioned.

The deed, mentioned in the declaration and exhibited by the plaintiff while on the witness stand, states a consideration in money, paid in cash, and he was attempting to prove what was the real consideration for the deed. A plat, designated as "No. 7087 Revised," referred to in and made a part of the deed, shows the 22.22 acres of land conveyed as lying along the main railway track of the defendant, and embracing the proposed centre line of a proposed new eastbound track, all the space between the two tracks and two certain triangular parcels of land between the defendant's two lines of railway and the county road; and also shows a proposed new county road from an old county road on the one side, across the lands conveyed and the defendant's two lines of railway, to a county road on the opposite side. The statement as to the location of his land made by the plaintiff shows that he owned about 124 acres, of which about 100 acres lay on the south side of the old railway right of way, and 24 acres on the north side thereof, upon which there was water for cattle, while there was none on the 100 acres south of the railway. The purpose of the parol evidence and the letters which the court below excluded, was to show that, as claimed in plaintiff's declaration, while the deed stated upon its face a consideration of \$2,999, "cash in hand paid, the receipt whereof is hereby acknowledged," the real consideration for the conveyance was not only this sum of money, but an agreement of the defendant to provide for the plaintiff a passway along the culvert, to be built on the side of the proposed new county road shown upon the map, for a cattle-pass from the south side of plaintiff's land to the north side thereof; that the agreement between the plaintiff and the defendant originally was, that the former would convey to the latter only the land necessary for its proposed new line of railway, which would require only about 11 acres, at the price of \$3,000, of which \$1 was paid when

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the agreement was made, and the \$2,999 to be paid subsequently; that afterwards plaintiff had another agreement with the defendant, that if he would embrace in his deed all of his land occupied by the proposed new line of railway and lying between the two railway tracks of the defendant, and also the two triangular pieces of land before mentioned, which together, contained an aggregate of 22.22 acres, the defendant would construct the passway for his cattle to pass from the land on the south side of the tracks to that lying on the north, as above mentioned; that the deed from the plaintiff to the defendant was executed in accordance with this last mentioned agreement, but while the defendant paid to the plaintiff the money consideration for the conveyance, when it began to construct the culvert for the passage of the county road under its tracks, it proposed to lay out the same to a width of 24 feet, instead of 30 feet as shown upon the map, providing no passway whatever for plaintiff's cattle according to what he contends was the agreement and a part of the consideration for the land conveyed other than the mere right of way for the defendant's proposed new line of railway; and that upon plaintiff's demand that the passway for his cattle be constructed in accordance with the agreement, the defendant refused to construct it.

The objection of the defendant to the introduction of the parol evidence offered on behalf of the plaintiff and excluded, was on the ground that it tended to alter and contradict the legal import of the deed, and that the plaintiff was seeking to prove that there were two contracts between him and the defendant, while his declaration alleged and his deed showed but one.

We are of opinion that the letters of Churchill, chief engineer, and Low, the real estate agent, offered by plaintiff in error, were inadmissible. They were not only written after the deed exhibited with the declaration was executed and delivered, but there had been no proof that the writers of the letters were the

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authorized agents of plaintiff in error, or that they had anything to do with the making of the contract between the parties. The only point made by the letter to which Churchill's is a reply, is that the county road should be located at a particular place, and it would seem that Low's letter was merely intended to express the view that defendant in error's claim that the county road shown on the map made a part of the deed, was to be an undergrade crossing, was well founded; that it was his (plaintiff in error's) intention to use the county road as a pass-way for his cattle; and that this plat, showing the road as it did, influenced plaintiff in error in selling the land conveyed by the deed, instead of the 11½ acres, for \$3,000.

Nor was the letter of Robertson, Hall & Woods at all relevant, and therefore it was also properly rejected. Neither the map with the deed, nor either of these letters, intimated any claim for a private passway, or of two contracts, while Robertson, Hall & Wood's letter says: "An option for this land was obtained from Mr. Trout by Mr. C. C. Taliaferro, representing the railway company, on November 6, 1905 \* \* \*. The property in question embraces 22.57 acres, as shown by plan 7057-Revised, which was attached to and made part of the option," etc. The "revised" plan referred to was shown to be the map exhibited with the deed as a part thereof.

The trouble with plaintiff in error's case is that, in his declaration, under the guise of enforcing payment of the purchase money for the land conveyed in the deed, he sets up a claim for an easement over the land conveyed—an encumbrance on the land, of which no mention is made in the deed—and the parol evidence offered by him was for the purpose of showing that he was entitled to recover of defendant in error damages for the non-performance of its contract to establish for the plaintiff in error the easement, when, in point of fact, the last expression of the parties as to the contract, is to be found in the deed itself.



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No fraud or misconduct is alleged in the declaration in the execution or procurement of the deed in question, and, therefore, this parol evidence was for the purpose of setting up a prior contract between the parties different from that contained in the deed.

It is true it is settled law that the consideration actually paid, or promised, can be shown to have been other than that recited in the instrument, or the fact of payment of the consideration agreed upon may be contradicted in an action for its recovery; but it is equally as well settled that parol evidence is inadmissible to alter or contradict the legal import of a deed. Its legal import may no more be contradicted by parol evidence than its actual expressions. *Calhoun & Cowan v. Wilson*, 27 Gratt. 649; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194.

"It is true that the deed need not contain all the stipulations of the parties. For example, agreements as to the consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties, but it does purport to contain the covenants of the grantor in respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proof in respect to an ordinary bill of sale of personal property." And the same will, of course, apply to a conveyance of land. *Browne on Parol Ev.*, sec. 104, *Cabot v. Christie*, 42 Vt. 121, 1 Am. St. Rep. 313.

As well stated by the author of *Browne on Ev.*, *supra*, "Parol evidence is incompetent to add any covenant to a deed, or to enlarge or contradict any covenant or create a reservation."

The deed between these parties professes to convey from the grantor a fee simple, unencumbered title to the land. It con-

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tains express covenants, "that the grantor has done no act to encumber it; that the grantee shall have quiet possession thereof free from all encumbrances;" while the proposed parol evidence offered was to show that the grantor reserved a passway six feet wide over the land conveyed, which the grantee promised so to construct and maintain that the grantor's stock might pass over it at will, although the map attached to the deed and made a part thereof, while it shows the change of location of the county road and places it across the land conveyed, contains nothing whatever to indicate that there was to be any such passway for cattle as plaintiff in error contends for. In effect, plaintiff in error is contending that by a contract, not proven or attempted to be proven to have been entered into prior to the deed, he reserved to himself a right which is wholly inconsistent with the terms of his deed.

In the case of *Melton v. Watkins*, 24 Ala. 433, 60 Am. Dec. 481, very similar to the case under consideration, the lower court had allowed proof of contemporaneous parol agreement that the grantor in a deed to land could remain in possession for a time; but the supreme court of that state held that this was error, the opinion saying: "It (the parol evidence) varied by parol the legal effect of the deed and took from the grantee an interest which the deed conveyed to him. The rule is too well settled to require the citation of authority that all previous or contemporaneous parol agreements or understandings between the parties materially altering or varying by adding to or subtracting from the written agreement, must be considered as merged in that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties, when it is clear and unambiguous."

The agreement for a passway over the land conveyed by plaintiff in error is not collateral, and does not relate to a subject distinct from the land, but is really a part and parcel of the subject conveyed. We can see no difference between re-

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serving a right of way and reserving the right to possession of the land after the conveyance, which was held in the case of *Melton v. Watkins*, *supra*, could not be done.

In *Shaver v. Edgell*, 48 W. Va. 502, 37, S. E. 664, the action was trespass *quare clausum fregit* against Edgell, who justified on the ground, among others, that he had conveyed the land to one Hall, under whom plaintiff claimed, with the agreement that he was to have a right of way over it, and that the trespass alleged was the use of the right of way. It was held that parol evidence to prove this agreement was not admissible, the opinion saying: "I think the court did not err in this. To admit such evidence would be dangerous in the extreme. The estate of man in land would be very precarious if such were the rule. His deed says he has absolute ownership unencumbered by the great burden of a right of way; but slippery memory or perjury comes up to contradict the deed and place a heavy encumbrance upon the owner's estate, largely detractive from the value of that estate. \* \* \* Here Edgell, granting all his right in land, seeks afterwards to detract from the legal effect of his conveyance by loading the land with the heavy encumbrance of a private right of way for all time."

It is not to be questioned that "a separate oral agreement as to any matter on which a contract is silent, and which is not inconsistent with its terms, may be proven by parol, if, under the circumstances of the particular case, it may be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any

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uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U. S. 510, 35 L. Ed. 837, 12 Sup. Ct. 46.

The map exhibited with the deed in this case is as much the declaration of the plaintiff in error as the other written portions of the deed, and, as we have remarked, there appears nothing on the map which indicates the passway for cattle as contended for by him.

In *Meade v. N. & W. Ry. Co.*, 89 Va. 296, 15 S. E. 497, the bill was filed to reform or cancel a deed granting the railroad company a right of way, because the parties had verbally agreed that a trestle with a passway under it should be erected across a ravine on the grantor's land, which agreement was not inserted because the parties deemed it unnecessary; but the relief was denied on the ground that parol evidence was inadmissible to show the agreement for the passway, such an agreement being inconsistent with the terms of the deed which was asked to be reformed or canceled.

In that case *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239, is cited as conclusive that the relief sought could not be granted. In the case cited it is said: "The authorities all agree that equity has jurisdiction to reform written instruments in two well defined classes of cases only, viz.: (1) Where there has been an innocent omission or insertion of a material stipulation contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagements of parties, when reduced to writing, to be varied by parol evidence, that in no case will relief be granted except where there is a plain

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mistake, clearly made out by satisfactory and unquestionable proofs."

This rule applies with more force in a court of law than in one of equity, and in referring to the rule, Harrison, J., in *Slaughter v. Smither*, 97 Va. 206, 33 S. E. 545, says: "This court has manifested no disposition to fritter away the rule of evidence in question by nice distinctions to meet the hardships, real or supposed, of particular cases." It was there further said, that it cannot be assumed that the written contract between the parties was designed as an imperfect expression of their agreement from the mere fact that it contains nothing on the subject to which the parol evidence offered is directed. "On that assumption, the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. \* \* \* Where parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between them, or declarations made by either of them, whether before, after, or at the time of the completion of the contract, will be rejected. If the written contract purports to contain the whole agreement and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible."

In *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. St. Rep. 380, the action was trespass on the case to recover damages for a breach of an alleged parol agreement between the parties, entered into at the time, or prior to, the execution of a lease of a certain brick factory; and the court held that parol evidence to establish this collateral agreement was inadmissible, for the reason that the written contract purported on its face to be complete and to contain the entire agreement of the parties; and that the parol evidence offered tended to add another term to the

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agreement, the agreement containing nothing on the subject to which the parol evidence was directed. The opinion in that case reviews a great number of decided cases, and declares, as this court did in *Slaughter v. Smither, supra*, that to admit parol proof to add to a written contract in such a case would be entirely to abrogate the rule of the common law, that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument.

We find nothing in the case here which takes it from under the control of that rule of the common law; and, therefore, the judgment complained of is affirmed.

*Affirmed.*

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Statement.

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**Richmond.****VIRGINIA FIRE & MARINE INS. CO. v. J. I. CASE THRESHING  
MACHINE CO.**

November 21, 1907.

Absent, Cardwell, J.

1. **FIRE INSURANCE—Clause Against Encumbrances—Breach—Recorded Lien—No Representations—Return of Premium**—Where a policy of fire insurance provides that the policy shall be void if the property insured be or become encumbered by any lien by mortgage, deed of trust, judgment or otherwise, prior or subsequent to the date of the policy, and at the date of the insurance there is a deed of trust on the property, duly recorded, the policy is avoided thereby, if the company had no other knowledge of such deed, although the application for the insurance was verbal and no questions were asked, and no representations made by the assured as to encumbrances. The assured, by acceptance of the policy, is charged with notice of its contents and bound by its conditions, and the company, by issuing the policy without inquiry, does not waive the condition as to title or encumbrances, unless the facts were known to the company or its agents when the policy was issued, or the company was chargeable with such knowledge; nor is the company obliged to return, or offer to return the premiums voluntarily paid as a condition precedent to availing itself of its defense to an action on the policy.

Error to a judgment of the Circuit Court of Clarke county in a proceeding by motion for a judgment. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Marshall McCormick*, for the plaintiff in error.

*Whiting & Smith*, for the defendant in error.

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BUCHANAN, J., delivered the opinion of the court.

The policy of insurance upon which this proceeding is based contains the following provision: "This entire policy \* \* \* shall be void \* \* \* if the property hereby insured, or any part or item thereof, be or becomes incumbered by any lien by mortgage, deed of trust, judgment, or otherwise, either prior or subsequent to the date hereof."

There was a deed of trust upon the property insured at the date the policy was issued, and the question involved here is, whether upon the facts agreed, the whole matter of law and fact being submitted to the court, it erred in holding that the insurance company was liable.

The facts agreed are as follows:

"First: That C. K. Sowers, the assignor of the plaintiff, was approached by an agent of the defendant insurance company to take out a policy of insurance upon his machine, which said Sowers agreed to do, without making any verbal representation to said agent as to his title or ownership in said machine and fixtures; that no written application was presented to the insured, C. K. Sowers; none was signed by him; no questions were asked by the agents of the insurance company as to title or incumbrances.

"Second: That C. K. Sowers paid the premium for said insurance, and the policy sued upon was delivered to him.

"Third: That the insured C. K. Sowers complied with all conditions of said policy, and that the fire occurred as alleged in the plaintiff's notice, without any fault on the part of C. K. Sowers.

"Fourth: That the amount sued for, \$700.00 is not more than three-fourths of the actual value of said machine and fixtures at the time it was burnt, as stated above.

"Fifth: That the property insured was encumbered by a deed of trust to secure part of the unpaid purchase money due to the



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plaintiff, which deed of trust was of record in the clerk's office of Clarke county. The compliance with the conditions of the policy referred to in the third clause of this agreement of facts does not refer to the condition, and was not intended to include the condition that there should be no existing or after-created encumbrance. It still, however, being agreed, that as to this condition, no written application was made, that none was either presented to the applicant or signed by him, that no questions were asked by the agent of the company as to encumbrances, and no verbal representations were made by C. K. Sowers, the insured, as to encumbrances."

Upon these facts, under the decision of this court in the case of *Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co.* 106 Va. 633, 56 S. E. 584, 1 Va. App. 61, the insured was not entitled to recover. In that case our decisions bearing upon the question under consideration were reviewed, and the conclusion reached, that where the condition of a fire insurance policy is that it shall be void if the interest of the insured be other than unconditional ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, the insured by accepting the policy is charged with notice of its contents and bound by its conditions, and the company by issuing the policy without inquiry does not waive the condition as to title and ownership unless the facts were known to the company or its agent when the policy was issued, or the company was chargeable with such knowledge; and that the insurance company is not obliged to return or offer to return the premiums voluntarily paid before notice of the fact that the policy was not in force as a condition precedent to availing itself of its defence to an action on the policy. In that case the condition of the policy was that it should be void if the interest of the insured was other than unconditional and sole ownership, or if the building insured should be upon ground not owned by the insured in fee simple. In this case, the condition of the

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policy is that it shall be void if the property insured, or any part thereof, was then or should become incumbered by any lien by mortgage, deed of trust, judgment or otherwise. If a breach of the condition in the one case avoided the policy, there is no reason why a breach in the other should not do so, for the principle involved in both is the same, and the current of authority is that the policy in the one, as in the other case, stands avoided under the facts disclosed by this record. 19 Cyc. 701.

The judgment of the circuit court must, therefore, be reversed; and this court will render such judgment as that court ought to have rendered.

*Reversed.*

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Opinion.

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**Richmond.**

## WILSON'S EXECUTOR v. KECKLEY.

November 21, 1907.

Absent, Keith, P., and Cardwell, J.

1. *NEW TRIAL—After-Discovered Evidence—Counter Affidavits.*—On the hearing of a motion to set aside a verdict for after-discovered evidence, counter affidavits may be received. To warrant a new trial for after-discovered evidence, the evidence must be such as ought, on another trial, to produce an opposite result on the merits, and not merely for the purpose of impeaching or discrediting a witness on the opposite side.

Error to a judgment by the Circuit Court of Rockingham county in a proceeding by motion for a judgment. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Ed. C. Martz and D. O. Dechert*, for the plaintiff in error.

*Conrad & Conrad*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The first question raised on this writ of error is whether or not, upon the motion to set aside the verdict on the ground of newly-discovered evidence, it was error in the court in passing upon that motion to consider counter affidavits.

It was settled in *Nicholas' case*, 91 Va. 741, 752, 21 S. E.

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364, that such affidavits may be considered by the court in determining whether or not a new trial should be granted on that ground.

The motion to set aside the verdict and award a new trial because of the newly discovered evidence was overruled, and this action of the court is also assigned as error.

The only issue in the case was whether or not the bond upon which the motion for judgment was based had been paid. Upon the trial the defendant introduced, among others, two witnesses, Clatterbuck and Landes, who testified that they were present when the bond in suit, or one of like amount, was paid, narrated the circumstances under which the payment was made, and said that they were called upon by Captain Wilson, the obligee in the bond sued on, to witness the fact that it had been paid, as the "note" was at the obligee's shop and not at his house, where the payment was made, and that he was dressing and in a hurry to go to the springs and did not have time to get it, but would mark it satisfied and surrender it to the defendant. The plaintiff, in opposition to this, testified that, in several conversations he had with defendant in reference to the bond, he claimed to have paid the note to the obligee in his barnyard while he was getting his horse and buggy to go to Sparkling Springs; that as he understood the defendant, he did not claim that anyone else was present at that time; and that the only person by whom he could prove the payment was a Mr. Leake, who took his place in the tannery, where he was employed while he went out at the dinner hour to make the payment.

The newly discovered evidence upon which the plaintiff relies tends to prove, in the language of his petition for the writ of error,

"1. That on the 9th day of August, 1901, when Wilson went to Sparkling Springs, and the only date upon which the payment claimed could have occurred at all with any of the attendant circumstances narrated by defendant's witnesses, Keckley

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(the defendant) was not at work at the tannery. \* \* \* This disposes at once of Clatterbuck, who claims to have been obliged to wait to see Keckley until he should have stopped work for the noon hour, and to have actually joined him on his way from work at the tannery; and of Landes, who as claimed by him and Clatterbuck came from the tannery with Keckley.

"2. That at the time when it is claimed by these witnesses the payment was made, Wilson was at the home of Miss Points—not at his own house—and the payment could not, therefore, have been made.

"3. That Wilson did not change his costume before leaving town, and, therefore, the testimony of Clatterbuck and Landes that he was dressing to go to the Springs when the alleged payment was made, could not be true. \* \* \*

"4. That at the time of said alleged payment the witness, Clatterbuck, was not in the town of Harrisonburg at all \* \* \*

The object of the newly-discovered evidence was manifestly to discredit the witnesses Clatterbuck and Landes, who had testified at the trial that they were present when the debt sued for was paid. None of the newly discovered witnesses knew anything about the fact in issue; their statements were as to other facts, which, if true, tended to show that Clatterbuck and Landes had testified falsely, as it was impossible for them to have been witnesses to the payment of the debt at the time and under the circumstances disclosed by their evidence. The object of this newly discovered evidence was not only to discredit Clatterbuck and Landes, but it is not at all clear, that, upon a new trial it ought to produce a different result, especially in the light of the counter affidavits—indeed, it could not do so unless the jury believed that those witnesses were wilfully swearing falsely.

With respect to granting new trials on the ground of after-discovered evidence, there are certain principles of law which must be considered as settled. Among these are, that the evi-

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dence must be such as ought, on another trial, to produce an opposite result on the merits, and that it must not be merely for the purpose of impeaching or discrediting a witness on the opposite side. *Thompson v. Com'th*, 8 Gratt. 637, 641; *St. John's Ex. v. Alderson*, 32 Gratt. 140; *Wynne v. Newman's Admr.*, 75 Va. 811; *Nicholas' Case*, 91 Va. 741, 21 S. E. 364.

Applying these principles to the motion for the new trial, we are of opinion that the circuit court did not err in overruling the same; and that the judgment complained of should be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

NORFOLK & WESTERN RAILWAY CO. v. OBENCHAIN.

November 21, 1907.

Absent, Cardwell, J.

1. **EQUITY PLEADING—Parties Defendant—Lack of Interest or Liability.**—A demurrer to a bill to restore a water-right is properly sustained as to a defendant who is not charged to have obstructed the right, whose rights are not involved in the suit, and against whom no relief is prayed either by the complainant or his co-defendant.
2. **DEEDS—What Passes—Appurtenances—Water Rights.**—A grant of all the grantor's "right, title and claim of whatever kind, in and to" certain property carries with it, as an appurtenance, the easement of a waterway over the lands of the grantor to and for the use of the premises granted, although such easement be not expressly mentioned. Code, Sec. 2443.
3. **EASEMENTS—Abandonment.**—The mere nonuser of an easement which has been created by grant does not extinguish it, or show that it has been abandoned. To show this, there must be acts by the owner showing an intention to abandon, or an adverse user by the owner of the servient tenement, acquiesced in by the owner of the dominant estate. Nothing short of a user by the owner of the servient estate, which is adverse to the enjoyment of the easement by the owner thereof, for a period sufficient to create a prescriptive right, will destroy the right granted.

Appeal from a decree of the Circuit Court of Botetourt county. Decree for complainant. Defendant appeals.

*Affirmed.*

The opinion states the case.

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*E. M. Pendleton*, for the appellant.

*W. B. Simmons* and *Benj. Haden*, for the appellee.

HARRISON, J., delivered the opinion of the court.

This bill in chancery was filed by the appellee, D. C. Obenchain, against the appellant and James Mundy, to have restored a certain water right alleged to have been obstructed by a wide and high fill made by the Norfolk & Western Railway Company over the route of the race and trunk, formerly used in conducting the water over the right of way granted by J. J. Echols to the Shenandoah Valley Railroad Company in August, 1881. The complainant claims that he owns this water right, and is entitled to have it flow from its source, unobstructed, to his foundry and machine shops; and that he has acquired this right under his purchase of this property from his grantor and her predecessors in title.

By decree of September, 1905, a demurrer to the bill by James Mundy, was sustained, and the bill dismissed as to him; and in June, 1906, the cause was considered on its merits, upon the proceedings had therein, and a decree entered, holding that the complainant was entitled to the water right in question as appurtenant to his foundry and machine shop lot; and the court, not being then advised as to the best method of affording the complainant relief, recommitted the cause to its master commissioner, who was directed to inquire and report whether the defendant railway company should be required unconditionally to remove the obstruction, or whether it should be required to provide a passageway for the water through its fill, and, if the latter, to locate the point at which such passageway should be constructed and the size of the same. From both of these decrees, this appeal has been taken.

We are of opinion that the circuit court committed no error



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in sustaining the demurrer of James Mundy and dismissing the bill as to him.

The only reference to James Mundy in the bill is that, by his deed of April 30, 1901, he had attempted and pretended to convey the water right in question to the appellant company, charging that Mundy did not own such water right, and that the railway company, therefore, acquired no rights under such pretended deed, which was void. The bill charged that the water right had been obstructed by the N. & W. Ry. Co. making a fill across the water course. It does not charge that Mundy had obstructed the water right; that he owned any land through which the water would run; or that he had any control over, or right to, the water. It does not allege that Mundy can or should be required to restore such water right if the complainant is entitled to it. No relief is prayed against Mundy, the prayer of the bill being that the appellant railway company be required to remove the fill, or that it be required to pay a money compensation in lieu of such removal, and that it be enjoined from further interfering with the flow of the water. There is no issue made by the pleadings between Mundy and the appellant railway company. The answer of the appellant was not filed as a cross bill, and Mundy was not made a party to it, and was not required to take any notice of its allegations. If it be claimed that Mundy is under a liability to the railroad company by reason of his deed of April 30, 1901, he is entitled to be properly impleaded by the company before a hearing of the controversy, in which controversy, so far as this record shows, the appellee, Obenchain, appears to have no interest.

We are further of opinion that there is no error in the decree of June, 1906, holding that the appellee, D. C. Obenchain, is entitled to the water right in question.

The record shows that in the year 1873 the property in controversy, together with other property, was sold and conveyed to one J. J. Echols by L. Linkenhoker, a special commissioner

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of the court. This deed from Linkenhoker, commissioner, to Echols conveys the water right in controversy to Echols, and by the citations it contains shows that, for many years prior thereto, this water right was recognized and reserved in the deeds conveying this foundry and machine shop property. In August, 1881, J. J. Echols granted and conveyed to the Shenandoah Valley Railroad Company, the predecessor in title to the appellant, a right of way for its railroad through these lands. In this deed, the grantor expressly reserved the right to have this water continue to flow uninterruptedly to his foundry and machine shops, and the Shenandoah Valley Railroad Company covenanted to so protect such water-way over the land conveyed to it as not to diminish the flow or affect the fall of the water in its passage to the machine shops. Subsequently, in October, 1881, Echols conveyed the foundry and machine shop lot, as to which he had reserved the water right in his deed to the Shenandoah Valley Railroad Company, to James Mundy, making special reference to the Linkenhoker deed as the source of his title and for a particular description of the property he was then conveying. In October, 1890, James Mundy conveyed all of his right, title, claim and interest, of whatever kind, in the controverted property to the Riverside Land Company, and it has passed, with its appurtenances, from that company through several alienations to the appellee, Obenchain, whose deed from Emma J. McLaughlin is dated February 26, 1902.

In April, 1901, the appellant railway company, the successor in title to the Shenandoah Valley Railroad Company, desiring to do away with the trestle then in use and to substitute the fill complained of across the water way, obtained from James Mundy, who had theretofore parted with the property, a deed reciting the covenant of the Shenandoah Valley Railroad Company, to protect the water right, and releasing the appellant from all obligation with respect to such water right,

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and authorizing it to fill up the space over the waterway theretofore spanned by the trestle.

The contention of the appellant is, that there is no express grant of the water right in the deed of October, 1890, from James Mundy to the Riverside Land Co., and nothing therein to indicate an intention to convey any water right; that the foundry and machine shops were then in a state of decay; and that the Riverside Land Co. bought the property to be divided up into town lots, which was done and the plat thereof recorded.

Mundy conveyed to the Riverside Land Co. *all of his right, title and claim, of whatever kind, in and to the controverted property*; among these rights which he owned was the water right in question, which had been conveyed to him by Echols, and the preservation and protection of which had been expressly guaranteed to the property by the recorded covenant of the Shenandoah Valley Railroad Company, before Mundy became the owner. It is true that the water right was not specifically mentioned in the deed from Mundy to the Riverside Company, but it was not *reserved* or *excepted* from that grant, and hence the easement passed from the grantor, as an appurtenance passing with the land, as fully as the buildings or other rights appurtenant thereto.

The code provides that, "Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced." Code, 1904, sec. 2443.

This right of easement originated by express grant, and is shown to be reasonably necessary to the beneficial enjoyment of the property in question, to which it is an appurtenance. Its preservation as an important appurtenance to the property was carefully guarded and protected when the right of way was granted to the Shenandoah Valley Railroad Company, and it has passed without qualification or reservation as a property right from those who originally created it, through successive

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owners, to the appellee, D. C. Obenchain. As late as April, 1901, the appellant, in changing its track from a trestle to a fill, recognized the existence of this water right and its value by attempting to buy it from James Mundy, and to obtain from him a release of the obligation it was under, by reason of the covenant of its predecessor, to preserve and protect the same.

It is true, as contended, that this property has for a long time been in a dilapidated condition, and that the water right in controversy has not been used for a number of years; but the mere nonuser of an easement which has been created by grant does not extinguish it, or show that it has been abandoned. Angell on Water Courses, sec. 252.

In *Watts v. Johnson R. E. Corp.* 105 Va. 519, 525, 54 S. E. 317, 319, it is said, citing numerous authorities: "The doctrine, too, is well settled, that mere nonuser of an easement created by deed for a period, however long, will not amount to abandonment. To show this there must be acts of the owner showing an intention to abandon, or an adverse user by the owner of the servient estate, acquiesced in by the owner of the dominant estate. Nothing short of a user by the owner of the servient estate, which is adverse to the enjoyment of the easement by the owner thereof, for a period sufficient to create a prescriptive right, will destroy the right granted."

The record in the case at bar does not justify the conclusion that the appellee, Obenchain, has abandoned the water right in controversy, or that it was ever abandoned by those under whom he claims.

For these reasons, the decrees complained of must be affirmed.

*Affirmed.*

## Syllabus.

**Richmond.**

## DEATRICK'S ADMINISTRATOR v. STATE LIFE INSURANCE CO.

November 29, 1907.

Absent, Cardwell, J.

1. PLEADING—*Plea in Abatement—Non-joinder of Issue—When Immaterial.*—Where there has been no formal joinder of issue on a plea, but it appears that the court to which the parties had submitted all matters of law and fact, and the plaintiff and defendant, dealt with the case as though the pleadings had been perfected; and the evidence was introduced and the case argued by counsel, and decided by the court as though the utmost formality in pleading had been observed, the plaintiff is estopped to raise the objection of the want of such joinder in this court for the first time, as it is manifest that no injury has resulted to him from the omission.
2. PLEADING—*Plea to the Jurisdiction—Duplicity.*—To constitute a sufficient plea to the jurisdiction of the court, every ground of jurisdiction enumerated in the statute must be negatived in the plea; and a plea which does this, is not bad for duplicity.
3. PROCESS—*When Sent to Another County.*—Process to commence an action can only issue to another county than that in which the action is brought when some jurisdictional fact exists under section 3214 of the Code.
4. PLEADING—*Venue—Plea to the Jurisdiction—Proof—Immateriality.*—In an action against a foreign corporation to recover a personal judgment against it, but where no attachment is sued out, it is immaterial whether the defendant did or did not have estate due it in the county where the action is brought; and, on trial of a plea to the jurisdiction, the lack of such estate need not be proved.
5. PLEADING—*Plea in Abatement—Better Writ.*—As a general rule, a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the state wherein the action is brought, but this requirement is not available where the plea shows a condition of facts under which no court in the state has jurisdiction.

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6. *VENUE—Foreign Corporation—Doing Business in State*—A foreign corporation may be sued on a transitory cause of action wherever it is doing business in such a manner, and to such an extent, as to warrant the inference that, through its agents, it is present.
7. *VENUE—Foreign Corporations—Service on Statutory Agent*.—Where none of the grounds of jurisdiction enumerated in sections 3214 and 3215 are present, an action against a foreign corporation must be brought where the statutory agent of the corporation resides. It cannot be brought in another county or city, and have process sent to the county or city in which such statutory agent resides.

Error to a judgment of the Circuit Court of Frederick county in an action under the statute for proceeding on insurance policies. Judgment for defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Barton & Boyd*, for the plaintiff in error.

*R. M. Ward*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Parvin E. Deatrick, of Martinsburg, W. Va., took out a policy of insurance upon his life in the State Life Insurance Company, of Indianapolis, Indiana. Some time after taking out this policy he died in the city of Martinsburg, W. Va., on January 27, 1905. His estate was committed to J. William Taylor, sergeant of the city of Winchester, Virginia, who brought suit upon the policy of insurance and filed his declaration to the second February rules, 1906. To the same rules the defendant appeared and filed three pleas in abatement, to the first of which the plaintiff replied; the replication was sustained, and this plea passed out of the case.

In Plea No. 2, the defendant cravedoyer of the writ and the

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return of the officer thereof, from which it appears that it was directed to the sheriff of the city of Richmond, and was served by his deputy upon Emmett Seaton, the statutory agent of the defendant company, in the city of Richmond. Thereupon the defendant prayed judgment of said writ and the return thereon, because "it appears from the said writ and the return thereon that the defendant is sued alone and not with any person residing in the county of Frederick; that the writ is directed to the sergeant of the city of Richmond, Virginia, and was by said officer or his deputy, served upon the agent of the defendant corporation within the said city; that at the time the writ was company, incorporated under the laws of the state of Indiana, company, incorporated under the laws of the State of Indiana, and not a resident of the state of Virginia, and that its principal office was and is at Indianapolis, Indiana, in which city its chief officer resides; and that plaintiff's decedent, Parvin E. Deatruck, did not reside in said county of Frederick at the date of the said policy of insurance, but that at the date of said policy, as well as at the date of his death, the said Parvin E. Deatruck resided in Martinsburg, in the county of Berkeley, and the state of West Virginia; that the defendant has no estate or debts due it within the jurisdiction of the court; and that no such affidavit and publication of process as is prescribed by section 3225 of the code of Virginia has been made; and this the defendant is ready to verify. Whereof the defendant prays judgment whether this court can or will take any further cognizance of the action aforesaid, and prays judgment of the said writ and return thereon, and that the same may be quashed."

Plea No. 3, leaving out the formal parts, avers that the defendant "is a life insurance company duly incorporated under the laws of the state of Indiana, and that the said supposed cause of action did not, nor did any part thereof, arise in said county of Frederick, nor elsewhere within the state of Vir-

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ginia, nor did the said plaintiff's decedent, Parvin E. Deatricks, reside in the said county of Frederick at the date of the said policy of insurance, nor at any time prior to or since said date; but that the said supposed cause of action, or some part thereof (if any such cause there be) did arise either within said city of Indianapolis, wherein said alleged contract of insurance was made and effected, or within the county of Berkeley, in the state of West Virginia, in which said county plaintiff's decedent, Parvin E. Deatricks, did reside at the time the alleged contract of insurance was made and effected, and wherein the said insured, Parvin E. Deatricks, resided at the time of his death, and in the court of which said county and state letters of administration upon the estate of said decedent were duly granted prior to the institution of this action, and wherein his personal representative, so appointed, qualified and has since resided; and that no court of the state of Virginia has jurisdiction over the said alleged cause of action; and this the defendant is ready to verify. Wherefore he prays judgment whether this court can or will take any further cognizance of the action aforesaid."

At the April term, 1906, the plaintiff, by its attorney, moved the court to reject pleas in abatement Nos. 2 and 3, and at the same term the following order was entered: "And the court having heard the argument of counsel upon the motions of the plaintiff to reject pleas in abatement 2 and 3, doth deny said motions. Thereupon the plaintiff replied generally to pleas in abatement 2 and 3, and this case is continued until the next term of this court for trial of the issues upon the said two pleas. And the defendant moved the court to quash the writ and the return thereon; and the court being of opinion that the same matters of law and fact are presented in the pleas in abatement doth overrule said motion until the court passes upon said pleas."

And at the June term the following order was entered:



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"This day came again the parties by their attorneys, and neither party requiring a jury, but agreeing to submit all matters of law and fact to the court, and the court having fully heard the evidence upon the issues made up at the April term, 1906, of this court, and on the motion to quash the writ, is of the opinion to sustain the pleas in abatement, and the motion to quash the writ in this case; and thereupon, for reasons stated in a written opinion made a part of this record, it is ordered that the said writ be quashed and the action of the plaintiff abated, and that he pay to the defendant its costs in this behalf sustained. To which ruling of the court the plaintiff excepted and tendered his bill of exception, and asks that the same be signed, sealed and enrolled, which is accordingly done."

To this judgment, a writ of error was obtained from this court.

The first error assigned is, that no issue was joined upon the pleas; and, strictly speaking, this seems to be true. There was no formal joinder of issue, but it appears that the court, the plaintiff and the defendant, dealt with the case as though the pleadings had been perfected. The evidence was introduced, and the case argued by counsel, and considered by the court, just as would have been done had the utmost formality in pleading been observed. It is certain, therefore, that the omission caused no injury to the plaintiff.

In *Keator Lumber Co. v. Thompson*, 144 U. S. 434, 36 L. Ed. 495, 12 Sup. Ct. 669, Mr. Justice Harlan, delivering the opinion of the court, said: "The objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, came too late after judgment was entered. The defendant was bound to know, when the court ordered the parties to proceed with the trial, that replications had not been filed to its first and third pleas. It should then have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the plead-

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ings were concerned, might be commenced." The opinion cites with approval *Kelsey v. Lamb*, 21 Ill. 559, where the supreme court of Illinois said: "If the defendant has filed his plea, and the other party fails to reply within the time required by the rules of the court, he has a right to judgment by default against the plaintiff, but until he obtains such default, the pleas cannot be considered as confessed by the plaintiff. It is the default which gives the right to consider and act upon the pleas as true. In this case no default was taken. When the parties submitted the case to trial by the court, without a jury by consent, it had the effect of submitting the case to trial on the pleadings, as if there were proper issues formed, and the court will hear evidence under all the pleas presenting a legal defense, precisely as if the allegations of such pleas had been formally traversed. This is the fair and reasonable construction to be given to such agreements. But it is otherwise where the party is compelled to proceed to trial without the issues being formed in the case. Then the act is not voluntary, and no such intendment can be made." "The defendant here," continues Judge Harlan, was compelled to proceed with the trial, but no objection was made by it to a trial because the issues were not fully made up."

In *Bartley v. McKinney*, 28 Gratt. 750, Judge Moncure delivered the unanimous opinion of the court, and we quote from the syllabus of that case as follows: "In an action of unlawful detainer the defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defense. There having been a verdict and judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court." Judge Moncure, in the course of his opinion, quotes with approval a passage from the opinion by Judge Staples in *Southside R. Co. v.*

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*Daniel*, 20 Gratt. 344, in which he refers to "the spirit of the modern cases, and the disposition manifested by the courts to disregard mere technical objections, unless there be something omitted so essential to the action or defense that judgment according to law and the very right of the case cannot be given." "This," says Judge Moncure, "strongly applies to this case. But, without considering that question, we are of opinion that there is no error in the judgment on the ground taken in the first assignment of error." To permit a party to make such an objection for the first time in an appellate court, Judge Moncure further declares, would be to allow him to take advantage of his own wrong, for had he made it in the court below, while the cause was pending there, it might, and no doubt would, at once have been removed. In fact the defendant has sustained no injury by what has been done in the court below in that respect; and the case was tried precisely in the same manner and with the same effect as if the plea of not guilty had been put in, and issue thereon had been joined in the case."

In *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148, which was a proceeding upon a motion, issue was joined upon the plea of non-assumpsit, but no replication was filed to a special plea of set-off under section 3299, this court said, that "The statute of joconfails does not apply to the omission to file such replication, and the failure to reply entitles the defendant to nominal damages, but the defendant waives the irregularity by going to trial without it." And in the opinion it is said, that "the defendant should have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced."

*Preston v. Salem Improvement Co.*, 91 Va. 583, 22 S. E. 486, was a proceeding by motion under section 3211 of the code. When the case was called in court the defendant declined to plead or tender any issue of fact, claiming the right,

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as it was a summary proceeding, to go to trial without any formal pleadings, and to produce orally in the progress of the trial any defenses he might have. The court declined to allow a jury to be sworn until and unless some issue of fact was joined. The parties thereupon submitted the matters of law and fact arising in the case to the determination and judgment of the court, but without waiving the defendant's exception to the refusal of the court to allow a jury. The judgment was for the plaintiff, and the defendant obtained a writ of error from this court and undertook to maintain the proposition that, having refused to plead when called upon to do so, he was entitled to a trial by jury without pleas; and thus made his own delinquency a ground for asking a reversal of the case. In the course of its opinion, the court cites quite a number of authorities to show that a judgment given upon a verdict cannot be sustained where no issue has been joined, and the judgment of the circuit court was affirmed.

In *Norfolk & Western Ry. Co. v. Coffey*, 104 Va. 665, 51 S. E. 729, 52 S. E. 367, the court held that in an action at law the statute of jeofails does not cure the nonjoinder, or want of issue altogether, and no verdict or judgment can properly be rendered therein; but from the opinion in that case it appears that "both court and counsel were taken by surprise at the reliance of the defendant on the statute of limitations." After not guilty was pleaded, and the issue upon it was regularly made, the defendant in vacation, filed in the clerk's office the plea of the statute of limitations, upon which no issue was joined, the plaintiff and the court being, as we have seen, in ignorance of its existence. It cannot be doubted that in this case no element of estoppel existed, for there can be no estoppel without knowledge. And so, too, of other cases in which this question has been raised in this court, and which will not be mentioned, because it would needlessly protract this opinion; but we believe that in every case in which the want of issue

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has been adjudged a ground for reversal, the facts upon an examination, will be found to be wholly different from the case before us, and that in every case in which the parties were advised of the state of the pleadings and were permitted to present evidence in support of their respective contentions, as though issues had been formally joined, they have been held to be estopped from making the objection after verdict rendered, because in such case, to repeat the language of *Bartley v. McKinney*, *supra*, "the defendant has sustained no injury by what has been done by the court below in that respect."

Objection is taken to the pleas on the score of duplicity. It is true that a plea in abatement, which sets up two or more distinct and sufficient defenses, either of which, if true, would necessitate a finding in favor of the defendant tendering the plea, is bad for duplicity; but a plea to jurisdiction which fails to negative the several grounds of jurisdiction enumerated in the statute, would be bad for insufficiency. To constitute a sufficient plea, every ground of jurisdiction enumerated in the statute must be negated in the plea.

Coming, then, to consider the pleas upon their merits, we concur with the learned judge of the circuit court in the view taken by him, that process can only issue to another county when some jurisdictional fact exists under section 3214. Now, in the case before us, adopting the analysis of the circuit court, it appears (1) that the insurance company was the sole defendant, and (2) that the insured did not reside in the county of Frederick at the time of his death, nor at the date of the policy of insurance, nor, indeed, at any period of his existence; to which may be added, that the defendant corporation is a non-resident; that its principal office is in the state of Indiana; and that its chief officer resides in the city of Indianapolis.

The pleas aver that the defendant company has no estate or debts due it within the jurisdiction of the court; and it is assigned as error in the judgment, that there was no proof of this

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avement. The only way in which the existence of estate or debts due to the defendant corporation could affect the question of jurisdiction would be under the attachment laws, by virtue of which jurisdiction over the particular subject, but not over the person of the defendant, could be acquired.

Section 2959 provides, in part, that if the defendant or one of the defendants is a foreign corporation or is not a resident of this state, and has estate or debts owing to it within the county or corporation in which the action is, or is sued with a defendant residing therein, or that the defendant, being a non-resident of this state, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or corporation in which the action is, upon the institution of any action at law accompanied by a proper affidavit, as prescribed in the preceding part of the section, an attachment shall issue. But in the case before us, the proceeding is manifestly not under the attachment law. The object of the suit was not to attach particular property, but to acquire general jurisdiction over the defendant, so as to authorize a personal judgment against it.

In *Guarantee Company v. National Bank*, 95 Va. 487, 28 S. E. 912, it is said: "The Guarantee Company being a foreign corporation, the circuit court of the city of Lynchburg could acquire jurisdiction of the suit against it only in some one of three ways: By the cause of action, or some part thereof, having arisen in the said city; by being sued with another who was a resident thereof; or by having estate or debts owing to it within said city." None of which conditions exist in this case.

A further objection to the pleas is, that they do not give the plaintiff a better writ; and it is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the state wherein the action is brought. But this requirement cannot avail where the plea

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shows a condition of facts under which no court in the state has jurisdiction.

We come now to the principal contention of plaintiff in error, as set forth in his petition. "The chief defense set up by the pleas in abatement is that no court in Virginia can entertain jurisdiction of a suit by a non-resident plaintiff on a contract not made in Virginia, against a non-resident corporation, except by attachment of the non-resident's property, even though, as is this case, the defendant be a non-resident insurance company having an agent in this state on whom, under the statute, process could be served. The claim of the plaintiff for jurisdiction, upon which he based his motion to reject the pleas in abatement, rests upon the ground that because no statute of Virginia gives to any particular court in Virginia jurisdiction over a suit against a non-resident corporation in favor of a non-resident plaintiff on a contract made out of the state, that, therefore, under the provisions of the constitution of the United States, art. 4, sec. 2, coupled with the statute requiring such non-resident insurance company as the defendant to have agents within the state upon whom process can be served, that any court of general jurisdiction in Virginia, from which process could be issued and be sent to be served on the statutory agent of such a corporation, has jurisdiction of such a suit."

In support of this proposition *Reeves v. Southern Ry. Co.*, 121 Ga. 49 S. E. 674, copiously annotated in 70 L. R. A. 513, is relied upon. That was an action brought in the city court of Atlanta by a plaintiff (whose residence does not appear in the case as reported) against a foreign railroad corporation doing business in the city of Atlanta. The defendant was duly served with process, according to the laws of the state of Georgia. The cause of action was a tort to property in the state of Alabama, consisting of injury to a horse; and the trial court had decided in favor of the railroad company, upon the authority of *Bawknight v. Liverpool, L. & G. Ins. Co.*, 55 Ga.

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194. That case was reviewed and overruled, the court holding that "A foreign corporation doing business in the state of Georgia and having agents located therein for this purpose, may be sued and served in the same manner as domestic corporations upon any transitory cause of action, whether originating in this state or otherwise; and it is immaterial whether the plaintiff be a non-resident or a resident of this state, provided the enforcement of the cause of action would not be contrary to the laws and policy of this state." In the course of its opinion, the court said: The fact that a corporation has no existence except in legal contemplation, gave rise to the conception that its existence could not be legally recognized outside of the territorial jurisdiction of the law-making power which created it, and that, therefore, it was impossible for a corporation to migrate beyond the bounds of its creator. This conception resulted in the court's holding that the corporation could not be sued in a jurisdiction foreign to that which gave it existence. While under this view, as a matter of theory, the corporation did not migrate, yet, as a matter of fact, its officers and agents did; and contracts were made in its name, and wrongs committed by its officers and agents, in territory far remote from that in which it was supposed to have its only legal existence. Great hardship and inconvenience resulted oftentimes from the application of this rule, which had the effect of compelling those who sought redress for breaches of contract and other legal wrongs against the corporation to bring their actions in the courts of the jurisdiction creating the corporation; the expenses of the remedy in many cases amounting to more than what would have been the fruits of recovery. The recognition of the hardship resulting from this rule brought about a modification of the rule, to the extent that, where a foreign corporation located an agent and actually transacted business in a foreign jurisdiction, it so far acquired a residence in that jurisdiction as to make it amenable to the processes of



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the courts thereof on all causes of action originating within that jurisdiction. The rule was then further modified to the extent that, where the corporation had an agent and was doing business in a foreign jurisdiction, it might be sued upon any transitory cause of action by a citizen of the state in which the corporation was thus doing business. And in this country it followed from this rule that, if a resident was allowed to bring this suit, any citizen of the United States would, under the constitution of the United States, have a similar right to bring suit."

In *Green v. C. B. & Q. Ry. Co.*, 205 U.S. 530, 51 L. Ed. 916, 27 Sup. Ct. 595, it was held that, "While in case of diverse citizenship the suit may be brought in the circuit court for the district of the residence of either party, there must be service within the district; and if the defendant is a non-resident corporation, service can only be made upon it if it is doing business in that district in such manner, and to such an extent, as to warrant the inference that it is present there through its agent. A railroad company which has no tracks within the district, is not doing business therein, in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic."

With the doctrine of these cases we concur, that a corporation may be sued upon a transitory cause of action wherever it is doing business in such a manner and to such an extent as to warrant the inference that, through its agents, it is there present. We further agree (though it is not necessary, perhaps, to decide it in this case), that by virtue of the constitution of the United States, Art. 4, sec. 2, any citizen of the United States would have a similar right to bring suit.

It is to be observed that in *Reeves v. Southern Ry. Co.*, *supra*, process was served upon the defendant in accordance with the laws of the state of Georgia, and the service was upon

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the agent in the district in which the corporation of which he was the agent was doing business, and doing business of such a character as to warrant the inference that through its agent it was there present.

It seems that service upon the statutory agent of a foreign insurance company is valid only so long as such company continues to do business in this state, and that when such a company ceases to do business in this state, it is no longer amenable to the jurisdiction of its courts. See *Millan v. Mut. Reserve Fund L. Asso.*, 103 Fed. 764, and numerous cases there cited. But it is unnecessary to decide that point in this case, for if all that is claimed by plaintiff in error with respect to the validity of the service upon the statutory agent be true, yet where none of the grounds of jurisdiction enumerated in sections 3214 and 3215 are present, the suit must be brought in the city of Richmond, where the statutory agent resides; and process cannot be sent, as was done in this case, from the city of Winchester to be served in the city of Richmond, where the insurance company is the sole defendant, and is not sued along with a resident defendant, or upon a policy of insurance issued upon the life of a person residing, either at the date of his death or at the date of the policy, in the county of Frederick. See *Warren v. Saunders*, 27 Gratt. 259.

We are of opinion that the judgment should be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.****SMITH AND OTHERS v. WHITE, TRUSTEE, AND OTHERS.**

November 21, 1907.

Absent, Keith, P., and Cardwell, J.

1. **APPEAL AND ERROR—Objections For The First Time—Disqualification of Judge—Evidence—Clerk's Certificate.**—The objection that a judge of a circuit court of a circuit adjoining that in which the suit was brought, or that a city judge presiding at the hearing of a cause without designation by the governor, as required by statute, cannot be made for the first time in this court; nor can the fact that the resident judge failed to enter of record his disqualification to sit be made to appear by the certificate of the clerk of the non-existence of such an entry. Such certificate is no part of the record. The custodian of documents and records cannot establish their non-existence in his office by his certificate to that effect, but must be sworn and examined as any other witness.
2. **APPEAL AND ERROR—Disqualification of Judge—Evidence—Presumption.**—The entry of record, required by statute, of the inability of a judge to sit in a case, is not an order or decree in the case, and the failure of the transcript of the record for an appeal to disclose such an entry is no evidence that the entry was not made, although certified by the clerk to be "a true and correct transcript and copy of all papers, evidence, certificates, orders and decrees as appear of record in my office." Where the court is one of general jurisdiction, having jurisdiction of the subject matter and the parties, and the presiding judge is one authorized to sit in the place of the disqualified incumbent, it will be presumed that the presiding judge acted under proper authority if the contrary does not affirmatively appear of record.
3. **WILLS—Construction—Gift to Wife and Children.**—A testator, by his will, declares: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She

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may, however, dispose of the whole amount by will, to take effect after her death, in the arrangement of which I desire her to take the advice of her husband."

*Held:* The wife and children, except the two elder sons, are jointly entitled to the income of the property during her life, and if she fails to dispose of the *corpus* by will, then it will pass to the said children and the heirs of the wife jointly.

**4. SALE OF INFANTS' LANDS—Conditional Sale Before Suit—Confirmation—**

*Evidence Required.*—In a suit brought under the statute for the sale of lands of persons under disabilities, a conditional sale made before suit brought may be approved and confirmed by the court as well as a sale directed, but, in either case, it must be clearly shown as a condition precedent to such confirmation or order of sale, independently of any admissions in the answers, that the interests of the infants, insane persons, or beneficiaries in the trust, as the case may be, will be promoted thereby.

**5. SALE OF INFANTS' LANDS—Affidavits as to Property—Other Judicial**

*Sales.*—While affidavits are admissible upon the question of the confirmation of an ordinary judicial sale, the propriety of making a sale under section 2616 of the code, or of confirming a conditional sale, made before suit brought under that section, cannot be determined upon *ex parte* affidavits.

Appeal from a decree of the Circuit Court of Albemarle county. Decree for complainant. Defendant appeals.

*Reversed.*

The opinion states the case.

*Walker & Sinclair* and *C. W. Allen*, for the appellants.

*Perkins & Perkins* and *White & Long*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The first error assigned is that the court had no jurisdiction of the case, because the record shows that Judge Christian, of the corporation court of the city of Lynchburg, who entered the decree appealed from, had no authority to sit in the case.

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The appellee instituted this suit in the circuit court of Albemarle county, of which he was judge, for the sale of certain real estate which he held in trust, and for the construction of the clause of the will under which he held the trust estate sought to be sold. By section 3049 of the code of 1904 it is provided, among other things, that "If the judge of any circuit or city court \* \* \* is so situated as to render it improper in his judgment for him to decide any case or proceeding, or to preside at any trial, civil or criminal, pending therein, unless said case or proceeding is removed as provided by law, the fact shall be entered of record by the clerk of said court, and at once certified by him to the governor, who shall designate a judge of some circuit court or of some city court for a city of the first class to preside at the trial of such cause or hold such term."

Appended to the transcript of the record filed with the petition for an appeal is a certified statement of the clerk of the court, made at the request of appellants' counsel, that the fact that Judge White was disqualified from sitting in the cause was not entered of record by the clerk nor certified by him to the governor.

This certificate is no part of the record in the case. The question of Judge Christian's right to sit in the cause was not raised in the trial court, and if it had been and the certificate in question had been offered in evidence to show that no such entry had been made, it would not have been admissible if objected to; for by the common law rule (and that rule has not been altered by statute in this state) the custodian of documents or records has no authority to certify that a specific document does not exist in his office, or that a particular entry was not made on his records. He cannot establish the *non-existence* of a particular document or entry by a certificate to that effect, but must be sworn and examined as any other witness. 3 Wigmore on Ev., sec. 1678, p. 2109; *Greer v. Ferguson*, 104 Ga. 552, 30 S. E. 943, 945-6.

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But it is claimed that the clerk's certificate to the copy of the record accompanying the petition for appeal—that it “is a true and correct transcript and copy of all papers, evidence, certificates, orders and decrees as appear of record in my office” in the cause—shows that no entry had been made of the fact that Judge White was so situated that it was improper for him to sit in the case.

The entry which the statute required the clerk to make was not an order or decree in the case, but was a mere statement of fact which he was required to enter of record. It does not, therefore, affirmatively appear from the record that the fact of Judge White's disqualification to sit in the case was not entered of record as required by the statute.

The circuit court of Albemarle county being a court of general jurisdiction, having jurisdiction both of the subject matter and the parties in this case, and the judge of another circuit or of a city court of the first class being authorized to sit in place of the disqualified incumbent under certain circumstances, it will be presumed, that Judge Christian, in sitting in the cause, acted under proper authority, the contrary not affirmatively appearing from the record. There is some conflict in the authorities upon this point, but the weight of authority and the better reason is in favor of the view here taken. See 23 Cyc. 562 and cases cited in notes 4 and 5; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Riggs v. Owen*, 120 Mo. 126, 25 S. W. 356; *State v. Newman*, 49 W. Va. 724, 39 S. E. 655; *Littleton v. Smith*, 119 Ind. 230, 21 N. E. 886; *Forrer v. Coffman*, 23 Gratt. 871; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

The case of *Gresham v. Ewell*, Judge, 85 Va. 1, 6 S. E. 700, is relied on by the appellants as sustaining their contention; but as we understand that case, it does not do so. In that case, it was conceded that the fact of the disqualified judge's inability to sit in the case was not entered of record as required by the statute, so that it affirmatively appeared in the view of the

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majority (two judges out of a court of three) that the visiting judge was without authority to enter the judgment complained of; and this was the ground of their decision as we construe it.

One of the objects of this suit was to obtain a construction of the 14th clause of the will of Dr. Cabell. That clause is as follows: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She may, however, dispose of the whole amount by will, to take effect after her death, in the arrangement of which I desire her to take the advice of her husband."

If the testator had stopped at the end of the first sentence of that clause, and it constituted all that related to the gift, it could not be doubted that, under the decision of *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976, and the authorities there cited, the wife and children, except the two elder sons, would take a joint fee simple estate in equity in the property devised. In the case of *Fitzpatrick v. Fitzpatrick*, the gift was to the wife and children, whilst in this the gift is to the executor, to be held in trust for the benefit of his wife and children. But the mere fact that the property is to be held in trust does not change the rights of the donees except to make it an equitable instead of a legal estate. That it was the intention of the testator that the children should take an interest in the gift as well as the mother, is emphasized by the exclusion of the executor's two elder sons, who had been provided for in other clauses of the will. If the mention of the children was merely to show the motive for the gift to the wife, as must be held if the children are excluded, there was no necessity for providing that the two elder sons should take nothing under that clause, because in that view, none of the children would taken anything.

The interest or estate which would pass by the first sentence

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of the clause, if it stood alone, is changed or modified in two particulars by the residue of the clause—First: That the income only of the devised property can be used during the life of the wife; and, Second: That the wife shall have power to dispose of the whole *corpus* by will.

It is contended on the one side, and the circuit court held, that the wife alone was entitled to the income of the property during her life. The language limiting the right to the use of the property during that time is as follows: "The income only of the amount thus devised shall be at *the* disposal during her life."

There is nothing in the language quoted which gives the wife the exclusive right to the income; neither is such right to be gathered from the context. The word "the" before the word "disposal" may be construed to mean "their" with as much, if not more, reason as to mean "her." The most that can be said is that the language of that sentence is ambiguous.

The general rule is that when words of a will, in the first instance, distinctly indicate an intention to make an absolute gift, such gift is not to be lessened or cut down by subsequent provisions which are not equally as clear and decisive as the terms by which it was created; and that where there are two apparently inconsistent and repugnant provisions in a will, the court will, as far as possible, reconcile them, and in so doing will endeavor not to disturb the first provision further than is absolutely necessary to give effect to the second. *Gaskins v. Hunton*, 92 Va. 528, 23 S. E. 885, and cases cited; *Hooe v. Hooe*, 13 Gratt. 245, 251-2, and cases cited.

Applying these principles of construction to the clause under consideration, we are opinion that the wife and the executor's children, other than the two elder sons, are jointly entitled to the income of the property devised during her life, and in the event the wife does not dispose of the *corpus* by will, then it will pass to the said children and the heirs of the wife jointly.



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We are of opinion, therefore, that the circuit court erred in the construction it placed upon the will.

Amongst the property passing under that provision was an interest in a tract of land known as "Morven," which contained something over one thousand acres. Some time after the death of Dr. Cabell, Edward B. Smith, his executor, died, owning the remainder of that tract, which passed according to the law of descents to his wife and children. By a subsequent family arrangement, that interest was conveyed to his executors to be held by them in the same manner and upon the same terms as the property which passed by the 14th clause of Dr. Cabell's will, of which they were also the trustees. The complainant, Judge White, as substituted trustee, instituted this suit under the provisions of section 2616 of the code, to have confirmed a sale of that tract of land, which he had made upon the condition that it met with the approval of the circuit court of Albemarle county. The widow of E. B. Smith, deceased, her living children, the child of a deceased child, and the heirs of Dr. Cabell, among others, were made parties to the bill.

There was a demurrer in writing to the bill, in which two grounds were stated—one because the bill did not state all the estate real and personal held in trust. The bill was amended in this respect. The other ground of demurrer was, that the statute (section 2616 of the code) under which the trustee was proceeding, did not authorize a conditional sale of the trust property and a subsequent approval and confirmation by the court, but required that the trustee should first apply to the court for authority to sell.

The statute has been generally construed by the circuit courts as authorizing the court which has jurisdiction to order a sale, to approve and confirm a sale made by the fiduciary before suit is brought subject to the court's approval and confirmation, provided "it be clearly shown, independently of any admissions in the answers, that the interests of the infant, insane person or

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beneficiaries in the trust, as the case may be, will be promoted, and the court is of opinion that the right of no person will be violated thereby \* \* \*," as required by section 2620 of the code. This practice has, we think, been beneficial to those in whose interest and for whose protection the statute was enacted, and is justified by the decisions of this court and the decided disposition it has shown to adopt the liberal rather than the strict rule of construction in interpreting the scope of a statute which it has held to be remedial in its nature. *Faulkner v. Davis*, 18 Gratt. 651, 669, 98 Am. Dec. 698.

In 1823, in the case of *Garland v. Lowry*, 1 Rand. 396, where a sale of land in which infants were interested had been made conditionally, a suit was instituted to have the contract ratified and the proceeds applied under the direction of a court of chancery to the objects of the trust, if it could be done, this court said: "The court is further of opinion, that unless the chancellor" (who had dismissed the bill) "shall be satisfied" (when the case goes back) "that it is necessary to appoint another guardian *ad litem*, or to take other steps to satisfy himself that the interests of the infants manifestly require a sale of the estate, as aforesaid, or should ultimately be so satisfied, it will be competent for him, instead of directing a sale by his decree aforesaid, to confirm that already made to Nathan Loftus, under the terms and conditions aforesaid, provided he is willing to abide thereby, and James Lowry and Nancy his wife are also willing to unite in the conveyance and to invest and secure the proceeds as aforesaid in the same manner as if such sale had originally been made in pursuance of a decree of the court."

In *Palmer v. Garland's Com.*, 81 Va. 544, where the committee of a lunatic filed his bill under the statute, to have the court's approval and confirmation of certain offers to purchase the lunatic's land, it was held that the court had authority under the statute in question, to approve and confirm the proposed sales where it appeared that the interests of the lunatic

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would be promoted and the rights of no one would be violated by such sales.

Whilst in a proceeding under the statute a conditional sale made before suit brought may be approved and confirmed by the court, as well as a sale directed; in either case, however, it must be clearly shown as a condition precedent to such confirmation or order of sale, independently of any admissions in the answers, that the interests of the infants, insane persons or beneficiaries in the trust, as the case may be, will be promoted thereby.

The complainant proved that he had made the conditional sale at the request, or with the consent, of several of the beneficiaries under the trust, including the widow of E. B. Smith, deceased, and introduced documentary evidence and took the depositions of a number of witnesses and the affidavits of three persons to show that the conditional sale was for an adequate price, and would promote the interests of the beneficiaries. On the other hand, Mrs. Smith, filed an answer in which, while admitting that the conditional sale had been made with her consent and approval, she alleged that it was a mistake, and opposed its confirmation. Other beneficiaries filed answers also, in which they opposed the confirmation of the sale. They also took depositions of an equal or greater number of witnesses to show that the consideration at which the sale was made was less than its real value, and that the interests of the beneficiaries would not be promoted by its confirmation. The testimony is very conflicting, and the record, excluding the affidavits filed by the complainant, which are objected to, does not *clearly* show that the price was adequate or that the interests of the beneficiaries would be promoted by the sale. The affidavits were *ex parte*, taken without notice, and filed on the day the case was submitted to the court for decision.

While affidavits are admissible upon the question of the confirmation of an ordinary sale made under a decree of court and

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reported to it for confirmation (*Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723), they are admitted largely upon the ground that courts in such cases must be able to act in a summary manner, and to avoid the delay which would result if depositions had to be taken. *Savery v. Sypher*, 6 Wall. 157, 159-160, 18 L. Ed. 822. But the reason for that practice has no application to a case in which the court has never considered or determined the propriety of a sale under section 2616 of the code.

As a general rule, in the absence of a statute authorizing it, affidavits are not admissible to establish the facts necessary to enable a court to enter a judgment or decree upon the merits of any case; and especially is this so in proceedings under section 2616 of the code, which involve the rights and interests of persons laboring as a rule under some disability.

We are of opinion, therefore, that the circuit court erred in approving and confirming the conditional sale made by the complainant trustee, since it did not clearly appear that the interests of the beneficiaries under the trust would be promoted thereby.

The decree appealed from will be reversed, and this court will enter such decree in the cause as the circuit court ought to have entered, construing the 14th clause of Dr. Cabell's will, and will remand the cause to the circuit court in order that the parties may take further evidence, if they be so advised, as to the propriety of confirming the sale or of selling the lands in the bill and proceedings mentioned.

*Reversed.*

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Statement.

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**Richmond.**

**WARD LUMBER COMPANY V. HENDERSON-WHITE MANUFACTURING COMPANY.**

November 29, 1907.

1. **APPEAL AND ERROR—*Constitutionality of Law—How Raised.***—Notice under section 3451 of the Code to reverse a judgment by default, and to quash an execution thereon, on the ground that "judgment was obtained by default and after service of process by publication only, and not by personal service thereof," sufficiently raises the constitutionality of section 3225, under which the service was made. Any proceeding which necessarily puts in issue the constitutionality of a statute, whether it be by demurrer, plea, instruction or otherwise, is sufficient to give this court jurisdiction of the case, regardless of the amount involved.
2. **CONSTITUTIONAL LAW—*Due Process—Corporations.***—The constitutional provision that "no person shall be deprived of his property without due process of law," includes private corporations.
3. **CONSTITUTIONAL LAW—*Due Process—Corporations—Publication of Process—Code, Section 3225.***—The provision of section 3225 of the code authorizing service of process on a domestic corporation by publication of the process, when there is no officer or agent of the corporation in the county on whom process may be served, affords "due process of law," and is constitutional.

Error to a judgment of the Circuit Court of Wise county on a motion to correct a judgment by default. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

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*Aubrey E. Strobe*, for the plaintiff in error.

*A. P. Crockett*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The defendant in error, a corporation organized under the laws of this state, with its home office in Danville, Va., having an alleged cause of action arising in Wise county, Virginia, against the plaintiff in error, also a Virginia corporation, with its home office in the city of Lynchburg, Va., on the 13th day of February, 1906, filed with the clerk of the circuit court of Wise county its memorandum of suit against the plaintiff in error, to recover the sum of \$210.94 due on account, which memorandum directed the clerk to "have summons published in Wise News," (a newspaper published in Wise county, Va), and to it was appended this affidavit, to-wit:

"State of Virginia,

"County of Wise, to-wit:

"This day personally appeared before me, C. J. Edwards, a notary public for the county and state aforesaid, Julian P. Thomas, Jr., attorney for the Henderson-White Manufacturing Company, and made oath before me in my county that the Ward Lumber Co., Inc., of Lynchburg, Virginia, has no agent or officer in the said county of Wise, on whom legal notice can be served.

"Given under my hand this 13th day of February, 1906.

"C. J. EDWARDS, *Notary Public*."

Upon the completion of the publication of the summons, as prescribed by section 3225 of the Code of 1904, the plaintiff in error not appearing, the circuit court of Wise county entered its judgment in favor of defendant in error against plaintiff in error for the amount of the debt sued for, with interest from

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the date it was alleged to have become payable, and for costs of the suit. On this judgment, execution issued and was levied by the sergeant of the city of Lynchburg upon the effects of plaintiff in error; whereupon, it, on the 17th day of July, 1906, moved the circuit court of Wise county to reverse the judgment, pursuant to the provisions of section 3451 of the Code, and also to quash the execution issued thereon, pursuant to section 3599 of the Code, upon the ground that "the judgment was obtained by default and after service of process by publication only, and not by personal service thereof;" which motions were overruled.

We are asked to dismiss the writ of error awarded to the said judgment, upon the ground that the amount involved is less than \$300, the only error assigned in the petition for the writ of error being, that the statute—section 3225 of the Code, *supra*—under which the suit was brought and maintained, is unconstitutional and void, and that the question was not raised nor passed on in the circuit court.

The motion to dismiss is without merit. While the jurisdiction of this court must affirmatively appear from the record, it does so appear when the court can see, as in this case, that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the Federal or state constitution. "Any proceeding which necessarily puts their validity in issue, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to give this court jurisdiction of the case." *Adkins & Co. v. City of Richmond*, 98 Va. 91, 34 S. E. 967, 81 Am. St. Rep. 705, 47 L. R. A. 583, and cases there cited.

It will be observed that the judgment in this case was by default after service of process by publication only, and both the notice of the motion to reverse the judgment pursuant to section 3451 of the Code, and of the motion to quash the execution issued on the judgment, pursuant to section 3599 of the Code, state as the ground of the motion, that "the judgment was

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obtained by default and after service of process by publication only, and not by personal service thereof." The plain meaning and effect of the notice authorized by statute, was to put in issue whether or not the statute (Sec. 3225) under which the judgment was obtained, is repugnant to the constitution of the state and the fourteenth amendment to the constitution of the United States; and when the motions were overruled the trial court necessarily reviewed the statute, ruling that it provides for "due process of law," and therefore not repugnant to the constitution of the state or of the United States.

The error complained of, however, does not arise out of the construction and interpretation of the statute, but is to the ruling of the trial court that the statute is constitutional and valid. In the latter case this court has appellate jurisdiction, regardless of the fact that the judgment is for less than \$300, while in the former it would not have, the constitutionality of the statute as distinguished from its construction and interpretation being the source of appellate jurisdiction. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

Section 3225 of the code, *supra*, after providing that process against, or notice to, a corporation (other than a municipal corporation or a bank) created by the laws of this state or some other state or country, may be served on certain named officers, etc., or in any case, if there be not in the county or corporation wherein the case is commenced, any other person on whom service can be had, as aforesaid, on any agent of the corporation against which the case is, or on any person declared by the laws of this state to be an agent of such corporation, reads as follows: "And if there be no such agent in the county or corporation wherein the case is commenced an affidavit of that fact, and that there is no person in said county or corporation on whom there can be service aforesaid, publication of the process once a week for four successive weeks, in a newspaper



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printed in this state shall be a sufficient service of such process or notice."

Section 11 of article 1 of the constitution of Virginia, and the 14th amendment to the constitution of the United States, provide, "that no person shall be deprived of his property without due process of law."

In determining whether or not, in a particular case, this constitutional provision is being violated, or has been violated, it is uniformly held "to include private corporations, such corporations being persons within the meaning of the fourteenth amendment." *C. C. & A. Ry. Co. v. Gibbs*, 142 U. S. 386, 35 L. Ed. 1051, 12 Sup. Ct. 255.

While this statute has been in force for nearly a quarter of a century, and several times amended (Acts 1885-6, p. 141; 1893-4, p. 614; 1895-6, p. 445), it has never come under review in this court, except in the case of *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77, and there the constitutionality of the statute was not called in question, the question decided being whether the defendant was a banking corporation, and, therefore, exempt from the operation of the statute, or to be regarded as an insurance company; and the court held that it was both a banking and an insurance company and not a banking corporation, and, therefore, the service by publication of the summons as provided by the statute was good.

In *Violett v. City of Alexandria*, 92 Va. 567, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382, it was said: "All the authorities agree that 'due process of law' requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property." Yet it was further said in that case, that while the legislature cannot dispense with notice altogether, it may prescribe the kind of notice. There the city's charter provided for no notice whatever, and therefore the ordinance of the city, under which it was

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attempted to fix a charge upon the property of the appellants to meet the cost of paving the streets, was held unconstitutional and void.

Section 3225 of the code, under review, applies to all corporations doing business in this state, except certain mentioned corporations, and the purpose of the legislature seems clearly to have been to provide against hardships arising where corporations go into various sections of the state, making contracts and carrying on their business, and then leave without closing the same satisfactorily and thereby compelling litigants to follow them perhaps across the entire state to litigate even small matters, or abandon their claims. Any lawful business which may be conducted by an individual may be conducted by a corporation chartered under the laws of the state, and it is a matter of common knowledge that there are many of these corporations which, while having a home office at some point in the state, through their agents and others, transact business and contract debts and incur liabilities in many sections of the state. It may be, as suggested by the learned counsel for plaintiff in error, that, under this statute a domestic corporation domiciled in Norfolk, Va., wishing to obtain a judgment against another domestic corporation domiciled in the same city upon some cause of action, real or fictitious, and desiring to keep from the defendant corporation knowledge that a suit was being prosecuted against it, might go to Highland county and institute its suit, and making the affidavit required by statute, which it might truthfully do within the limits of the statute, and without making oath that its claim was believed to be just, obtain an order of publication, which, under the statute, if printed once a week for four successive weeks in a newspaper printed in Lee county, however limited its circulation, would yet obtain "a sufficient service of such process." But it is to be borne in mind that before such proceedings as suggested could be had, there must be jurisdiction in the court in which the proceedings

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are instituted; under section 3215 of the code; and it would be a reflection on the judiciary of this state to say that judgment could be obtained in any county where jurisdiction is wanting.

Section 3215, *supra*, provides: "An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein;" and section 3214 provides: "Any action at law, if it be to recover a loss under a policy of insurance, either upon property or life, may be brought in any county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy." It was under this latter section that this court, in *Wytheville Ins. Co. v. Stultz*, *supra*, held that the publication of the summons, as provided by section 3225, was a good and valid service of notice to the defendant.

Professor Lile, in his Notes on Corporations, p. 342, discusses the statute and explains it fully, showing the difference between domestic and foreign corporations. As he shows, when the action is against a domestic corporation, the summons is published and made returnable to rules, and not to appear in fifteen days, as is other cases. He makes no suggestion of a question as to the constitutionality of the statute.

In an article appearing in 2 Va. L. Reg. 545, the author reviews the statutes providing for the summoning of corporations by publication, but makes no suggestion of a doubt as to the constitutionality of section 3225, here in question. He calls attention to the difference in the requirements of section 3230 and the three sections following, and the provision of section 3225, and shows that the sections other than the last named do not apply to corporations, and clearly indicates an opinion that where the provisions of section 3225 are complied with, the defendant corporation is duly summoned.

That hardships may arise out of the execution and enforce-

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ment of this statute is very probable; but the courts of the state cannot, for that reason only, declare a statute unconstitutional; "nor can a court declare a statute unconstitutional and void solely on the ground of unjust or oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution." Cooley's Const. Lim. (6 ed.) 197.

"It is true," says this learned author, "there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the constitution had imposed no restraint." On page 200 the same author further says: "The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The

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judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

In 8 Cyc., 778, it is said, that the generally accepted rule is that the courts will not declare a statute void merely because, in their opinion, it is opposed to the spirit supposed to pervade the constitution.

And in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, the court said: "When congress or a state legislature pass a law within the general scope of their constitutional power, the courts cannot pronounce it void merely because, in their judgment, it is contrary to the principles of natural justice, and the great weight of authority favors the rule laid down in this case."

Among the authorities relied on by counsel for plaintiff in error as supporting the contention that section 3225 of the code does not meet the constitutional requirement of "due process of law," is the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; but in that case the court was dealing with foreign and not domestic corporations, and neither in that case nor in any other that we have been able to find, was it held that the legislature has not the right to prescribe a mode of service where the statute has no extra-territorial effect. On the contrary, the authorities are in accord with what was said by this court in *Violett v. Alexandria*, *supra*, that while the legislature cannot dispense with notice altogether, it may prescribe the kind of notice. With the wisdom of the statute the courts have nothing to do, and it may be that the mode of service prescribed might have been different and for the better, in that it would have been more effective and better calculated to arrest the at-

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tention of a defendant against whom the summons published is directed; or, as in an action against an insurance company created by the laws of this state, where the statute, although the action may be brought in the county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy, requires that process or notice shall be directed to the sheriff or sergeant of the county or corporation wherein the chief office of such company is located. But these are matters for legislative consideration, and not for the determination of the courts.

Constructive service of a summons or a notice, as authorized by the statutes, has over and over been recognized as a valid service, and a reasonable exercise of legislative authority, and we can see no reason why the mode of service provided in section 3225, which was strictly followed in this case, should be regarded as either lacking "due process of law" or the reasonable exercise of legislative authority.

We are, therefore, of opinion that the judgment of the circuit court must be affirmed.

KEITH, P., dissents.

*Affirmed.*

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**Richmond.****HAMER v. COMMONWEALTH.**

November 21, 1907.

**1. APPEAL AND ERROR—Termination of Controversy—Moot Questions.—**

Whenever it appears, or is made to appear by extrinsic evidence, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, the appeal or writ of error should be dismissed. Courts of justice sit to decide actual controversies by a judgment which can be enforced, and not to give opinions upon moot questions or abstract propositions of law.

Error to a judgment of the Circuit Court of Alleghany County in a proceeding by *Quo Warranto*.

*Dismissed.*

This proceeding is one of several instituted by the attorney for the commonwealth of Alleghany county against the judges of election, appointed by the Electoral Board of Alleghany county, and the judges appointed by the common council of the town of Covington, situated in said county, to determine which of said judges were entitled to hold the office and discharge its duties.

*Geo. A. Revercomb* and *Jno. T. Delany*, for the plaintiff in error.

*Attorney-General Wm. A. Anderson*, for the commonwealth.

HARRISON, J., delivered the opinion of the court.

This *quo warranto* proceeding was instituted in September,

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1906, by the attorney for the commonwealth of Alleghany county, to have determined a conflict between certain parties claiming to be judges of election for the second ward in the town of Covington.

The plaintiff in error, together with two others, were appointed judges of election for said second ward by the electoral board for the county of Alleghany; and their contestants, three in number, were appointed to the same office by the council of the town of Covington. The circuit court of Alleghany county held that those persons appointed as judges of election by the council of the town of Covington were entitled to hold the office and discharge its duties. To that judgment this writ of error was awarded, October 8, 1906, upon the petition of one of the parties who had been appointed by the electoral board.

It appears that the term of the office in question has, under the law, expired since this writ of error was awarded. This being so, the issue has become extinct. Neither party is now holding the office for the stated term, or can hold it for such term. There can, therefore, be no judgment of ouster or the contrary lawfully rendered, and the case must be dismissed.

Whenever it appears, or is made to appear, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case. It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and when no relief can be afforded. Only real controversies and existing rights are entitled to invoke the exercise of their powers. *Franklin v. Peers*, 95 Va. 602, 29 S. E. 321; *Shumate v. Spilman*, 1 Va. Dec. 604; *Meyer v. Pritchard*, 131 U. S. CCIX, 23 L. Ed. 961; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293.

In the case last cited, Mr. Justice Gray says: "The duty of this court, as of every other judicial tribunal, is to decide



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actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." Citing *Lord v. Veazie*, 8 How. 251, 12 L. Ed. 367; *California v. San Pablo & Tulare Railroad*, 149 U. S. 308, 37 L. Ed. 747, 13 Sup. Ct. 876.

The controversy in the case at bar having ceased to exist, leaving only moot questions, there can be no recovery for costs in this court, where such a judgment depends upon the substantial result of the litigation. The case must, therefore, be dismissed without costs to either party.

*Dismissed.*

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Syllabus.

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**Staunton.**

## CITY OF ROANOKE AND OTHERS v. BLAIR.

September 12, 1907.

REHEARD January 16, 1908.

1. **EVIDENCE—Construction of Writings—Extrinsic Evidence.**—Written instruments are to be construed by the terms used therein, if plain and intelligible. Extrinsic evidence is not admissible for the purpose of adding to, detracting from or in any way varying the plain meaning of the instrument itself. In construing a writing, extrinsic evidence may, as a rule, be admitted only for the purpose of explaining a latent ambiguity, or of applying ambiguous words to their proper subject matter. Words of a definite legal significance, or which have a well defined primary meaning, are to be understood as used in such sense, unless there appear in the writing a manifest intention of using them in a different sense.
2. **BOUNDARIES—Calls—"East"—Straight Lines.**—The word "East," when used in describing a boundary, means "due East," unless other words are used qualifying that meaning; and where a call is from one point or monument to another, the line is presumed to be a straight line, unless a different line is described in the instrument.
3. **STATUTE—Construction—Unambiguous Language.**—If the language of a statute is free from doubt and ambiguity, the same strictness is to be applied in its construction as is applied in construing grants and contracts between private persons.
4. **APPEAL AND ERROR—Effect of Appeal on Rights of Parties not Appealing.**—Under the statutes of this state and the rule of this court, the rule of decision is that where the parties stand on distinct and unconnected grounds, where their rights are separate and not equally affected by the same decree or judgment, the appeal of one will not bring up for adjudication the rights or claims of the

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others. But where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same judgment or decree, this court will consider the whole case, and settle the rights of the parties not appealing as well as those who bring up their case by appeal.

Appeal from the Corporation Court of the city of Roanoke.  
Decree for complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

*Robertson & Wingfield, Robertson, Hall & Woods, Berkley & Bryan, Hart & Hart, C. B. Moomaw, C. A. McHugh and S. Hamilton Graves, for the appellants.*

*Robert E. Scott, for the appellee.*

BUCHANAN, J., delivered the opinion of the court.

The appellee instituted this suit to subject certain lots to the payment of a judgment which she alleged was a lien thereon.

It is conceded that, if the lots were embraced within the corporate limits of the city of Roanoke, as defined by an act approved February 3, 1882, (Acts 1881-2, Ch. 57, p. 52), they are not subject to the lien of the appellee's judgment. The first question, therefore, to be considered is whether or not the lots were within the city limits as defined by that act.

The boundary line of the city nearest the lots in question is described as follows in the act: "Thence with said Rorer and John M. Shaver's line north to the Norfolk and Western Railroad; thence east to the lands of Q. M. Word; and thence to the line of H. S. Trout, R. B. Moorman and E. H. Engle."

There is no dispute as to the point called for on the line of

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the Norfolk and Western Railroad, nor as to the point called for in the line of Trout, Moorman and Engle; but the controversy between the parties is as to the proper location of the line between those points. These lines were never surveyed, so far as the record shows, until after the institution of this suit. The appellee insists that, under a proper construction of the act, in the light of the contemporaneous construction placed upon it by certain officials of the city and of the county of Roanoke, and of the understanding of persons owning lands adjoining or near the line in controversy, the corporate line ran from the admitted point on the Norfolk and Western Railroad, along the line of the railroad to a point where the lands of Word and Trout corner, and from that corner to the admitted point where the lines of Trout, Moorman and Engle corner; and the corporation court so held.

The contention of the appellants is that there is no ambiguity in the language of the act defining the boundary of the city between the admitted corner on the Norfolk and Western Railroad and the admitted corner of Trout, Moorman and Engle, and no difficulty in applying that language to its subject matter; and that the line runs a due east course from the railroad corner to Word's line, and from the point where it strikes his line to Trout, Moorman and Engle's corner.

It is well settled, as a general rule, that a written instrument must be construed by the terms used therein, if plain and intelligible; that extrinsic evidence is not admissible for the purpose of adding to, detracting from, or in any way varying the plain meaning of the instrument itself; that, in construing a writing extrinsic evidence may, as a rule, only be admitted for the purpose of explaining a latent ambiguity, or of applying ambiguous words to their proper subject matter; and that words of a definite legal significance, or which have a well defined primary meaning, are to be understood as used in such sense, unless there appear in the writing a manifest intention of using them

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in a different sense. *Findley v. Findley*, 11 Gratt. 434, 437-8; *Price v. Harrison*, 31 Gratt. 114, 118; *Bank v. McVeigh*, 32 Gratt. 530, 541; *Knick v. Knick*, 75 Va. 12, 19-20; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345, and cases cited; *Sherwood v. A. & D. Ry. Co.*, 94 Va. 291, 301, 26 S. E. 943; *Grubb v. Burford*, 98 Va. 553, 557, 37 S. E. 4; *Watts v. Newberry*, ante, p. 233, 57 S. E. 657, 1 Va. App. 381; Cooley's Const. Lim., pp. 91-94.

Let us apply these rules of construction to the language of the calls of the disputed line. The first call in that line is, "thence east to the lands of Q. M. Word." The word or term "east" has a well established legal meaning, and means due east unless other words are used, qualifying that meaning. Devlin on Deeds, sec. 1035; *Dogan v. Searight*, 4 H. & M., 131; 5 Cyc. 875. There is nothing in the call to indicate that it was not intended to have its usual meaning; nor does the use of that word in other parts of the description of the boundary line of the city show satisfactorily that it should have a different meaning.

But if "east," as used in the act, meant "eastwardly," as insisted by the appellee, there was nothing in the call or in the act which furnished any authority for establishing a curved or crooked line as was done, for where a call is from one point or monument to another, unless a different line is described in the instrument, the line is presumed to be a straight line. See 5 Cyc. 876, 878; *Smith, v. Davis*, 4 Gratt. 50; *Marlow v. Bell*, 13 Gratt. 531; *Tucker v. Saterthwaite*, 123 N. C. 511, 31 S. E. 722.

The counsel of appellee admit that a strict construction of the act would seem to demand that the line wherever established should be a straight line, and insist that it will be straight if run from the railroad corner to Word's and Trout's corner; but to so establish the line would not only violate the terms of the call, but ignore the contemporaneous construction relied on to

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justify the court in departing from the language of the call. The line as established by the court in no respect conforms to the call. It is not a straight line running east or eastwardly, but is a curved or irregular line, running with the lands of the Norfolk and Western Railway Company. By running a straight line due east from the railroad corner to Word's line, all the requirements of the call are satisfied.

But it is insisted by the appellee that the same strictness is not observed in construing acts of the general assembly in forming counties and municipalities as in construing grants and contracts between private individuals. The case of *Hamilton v. McNeil*, 13 Gratt. 389, is cited and relied on to sustain this contention.

The controversy in that case involved the true location of the boundary line between the counties of Pocahontas and Pendleton. It was doubtful from the language of the act defining the boundary line between the counties, whether the call for beginning "on the top of the Alleghany mountain, the northwest side of the line of the county of Pendleton," would not require that the beginning should be at some point on the main Alleghany mountain, as contended by one party, or would be satisfied by beginning at a point on a mountain lying west of the main Alleghany, as contended by the other party. There being this doubt, the court adopted that construction which was in accord with the general policy of the legislature, as evinced by various acts before and afterwards enacted to establish and preserve the main Alleghany mountain as the line between adjacent counties, and was in accord with "the contemporaneous exposition thereof" (the act) "by the courts and other authorities of Pocahontas county, in exercising immediately after its passage exclusive jurisdiction over said territory without question from any quarter; by the complete surrender of such jurisdiction by the courts and authorities of Pendleton county; by its recognition by the general assembly in repeated acts of sub-

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sequent legislation; by the representation of county boundaries on maps prepared and published under the authority of the legislature and in conformity with the provisions of laws requiring the exterior boundaries of the counties to be laid down by actual survey, or by reference to one or more actual surveys, and strict accuracy to be observed in denoting the true position of the corners of adjacent counties; and by its universal acceptance as the true construction by the people generally, from the passage of the act until the origin of the present litigation.

If it be conceded that the charters of towns and cities, with their comparatively small territorial area, should be construed with the same liberality as acts forming new counties, there is nothing, as it seems to us, in the rule laid down in that case which would justify a court in departing from the language of the act under consideration upon the facts of this case. In that case the language was ambiguous; in this it is not. In that case there was a well recognized public policy which it was the court's duty to uphold, unless it was manifest from the act that the legislature intended to depart from that policy; in this case there is no question of public policy involved. In that case, the contemporaneous construction placed upon the act by the counties, the public, and especially by the general assembly, was such as to leave no room for doubt as to its intention; in this case the general assembly has not manifested its intention by any subsequent act, nor is the evidence of the contemporaneous construction placed upon it so clear and satisfactory as the evidence of contemporaneous construction in that case, though the weight of evidence upon that question is in favor of the location of the disputed line as claimed by the appellee, and might perhaps be sufficient to sustain the conclusion of the trial court if the language of the act had been ambiguous and there had been some legislative policy to be upheld.

It follows from what has been said, that we are of opinion that the true boundary line between the city of Roanoke and

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the county of Roanoke (at the time the charter of that city was amended, on the 30th of January, 1890), from the point on the Norfolk and Western at Shaver's crossing to the point where the lands of Trout, Moorman and Engle corner, ran as follows, to-wit: From the point on the Norfolk and Western Railroad at Shaver's crossing a due east line to the southern line of the lands known in the bill and proceedings as Q. M. Word's land; thence in a straight line to the corner of Trout, Moorman and Engle; that the judgment of the appellee is not a lien upon the lands sought to be subjected in this suit; and that the trial court erred in holding that it was.

The decree appealed from must be reversed, and the appellee's bill dismissed.

ON REHEARING, JANUARY 16, 1908.

BUCHANAN, J.

After the opinion of the court had been delivered and a decree dismissing the bill generally had been entered, the appellee, Gertrude Blair, who had filed the bill, moved the court to set aside the decree dismissing it generally, because she was seeking by her suit to subject lands to the payment of her judgment outside of the corporate limits of the city of Roanoke as defined by the said act of assembly approved February 3, 1882; that a decree be entered dismissing the bill only as to the appellants who had no interest in the lands sought to be subjected lying outside of the corporate limits of that city, as defined by that act and construed by this court; and that the decree appealed from in all other respects be affirmed.

When the cause was heard, the oral argument was directed almost, if not entirely, to the question as to the true location of the boundary lines of the city, as defined by the act of February 3, 1882, and this court did overlook the fact that the



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complainant was seeking to subject lands to the payment of her judgment lying outside of the limits of the said disputed boundaries, and erred in dismissing the bill generally. That decree must, therefore, be set aside.

We are of opinion, however, that the bill should not only be dismissed as to the appellants who have no interest in the lands sought to be subjected lying outside of the disputed boundaries, but should be dismissed as to all the defendants who had no interest in the lands not lying within the disputed boundaries, although some of them did not appeal from the decree complained of.

Section 3469 of the code provides that every appeal shall be docketed at the place of session where it is to be heard, and that "the clerk of the said court shall issue a summons against the parties interested, other than the petitioners, that they may be heard, and also issue any supersedeas that may be awarded."

By section 3485 of the code it is provided that "the appellate court shall affirm the judgment, decree or order, if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered."

Rule VIII of the court (formerly Rule IX) provides that, "in any appeal, writ of error or supersedeas, if error is perceived against any appellee or defendant, the court will consider the whole record as before them, and will reverse the proceedings, either in whole or in part, in the same manner as they would do were the appellee or defendant to bring the same before them, either by appeal, writ of error or supersedeas, unless such error be waived by the appellee or defendant, which waiver shall be considered a release of errors." Rules of Court, 106 Va. vii.

Under these provisions of the code and this rule of the court, the rule of decision as established by the practice and the cases is stated as follows in *Walker's Ex'or v. Page*, 21 Gratt. 636,

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652, viz.: "Where the parties stand upon distinct and unconnected grounds, where their rights are separate and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the others. *Tate v. Liggat & Mathews*, 2 Leigh 84, 107. But where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, this court will consider the whole case and settle the rights of the parties not appealing as well as those who bring up their case by appeal. *Lewis v. Thornton*, 6 Munf. 87, 97; *Lenow v. Lenow*, 8 Gratt. 349; *Liggat & Mathews v. Morgan*, 2 Leigh 84; *Purcell v. McCleary*, 1 Gratt. 246." *Saunders v. Griggs*, 81 Va. 506; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; *Nicholson v. Gloucester Charity School*, 93 Va. 101, 103, 24 S. E. 899.

In the case under consideration, all the defendants claiming an interest in the land sought to be subjected within the disputed boundaries stood, as to that land, upon the same ground, their rights were involved in the same question and equally affected by the decree. If the lands in the disputed boundaries were within the corporate limits of the city of Roanoke, as defined by the act of February 3, 1882, then complainant's judgment was a lien upon them; otherwise it was not.

We are of opinion, therefore, that the complainant's bill should be dismissed as to all such defendants.

We are further of opinion that there is no other error in the decree, and that the same in all other respects should be affirmed.

*Reversed.*

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Statement.

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**Richmond.**

BUGG v. SEAY.

January 16, 1908.

1. **EJECTION—Prior Purchaser—Unrecorded Deed—Proof of Payment of Consideration by Subsequent Purchaser.**—If a party claiming to be the purchaser of a tract of land for a valuable consideration and without notice of a prior unrecorded deed, can maintain ejectment against the grantee therein, he must show that he received his conveyance and actually paid the purchase money before he had notice of the prior unrecorded deed. The recital in his deed of the payment of the purchase money is evidence against his grantor, but as against the grantee in the prior deed is mere hearsay.
2. **EJECTION—Plaintiff's Title.**—It is incumbent on the plaintiff in ejectment to trace his title to the commonwealth, or in some other manner show that he is entitled to the possession of the land sought to be recovered as against the defendant.
3. **TRIAL—Rejection of Evidence—When Harmless.**—It is unnecessary to decide whether the trial court erred in rejecting evidence, where it appears that if the rejected evidence had been received, the jury could not have found any other verdict than the one they did find.
4. **CORRECT VERDICT—Ruling on Instructions.**—The action of the trial court in granting an instruction becomes immaterial when in no view of the case could there have been a different verdict.
5. **APPEAL AND ERROR—Invited Error.**—A party will not be permitted in this court to complain of an error committed in the trial court into which he invited the court, especially if it did him no injury.

Error to a judgment of the Circuit Court of Fluvanna county in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

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*W. B. Pettit's Sons*, for the plaintiff in error.

*J. O. Shepperd*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The plaintiff in error instituted his action of ejectment to recover a tract of forty acres of land. Upon the trial of the cause, there was a verdict and judgment for the defendant. To that judgment this writ of error was awarded.

One of the errors assigned is that the trial court ought to have set aside the verdict of the jury because contrary to the law and the evidence.

The defendant did not offer any evidence to sustain his plea of not guilty. The plaintiff, in his declaration, referred to and described the land which he sought to recover as "being the same land mentioned and described in a deed from R. B. Seay" (the plaintiff's grantor) "to George P. Seay" (the defendant) "dated the 30th day of December, 1901, and of record in the clerk's office of Fluvanna county court in Deed Book 30, page 227." That deed was not offered in evidence, but seems to have been treated in the trial court as a part of the record and before the jury, because referred to in the declaration. The deed is copied into the record, and in the briefs of counsel on both sides here is treated as part of the record, but in oral argument the plaintiff's counsel insisted that it was no part of the record because not made so by bill of exception.

In the view we take of the case, the same result will follow, whether it was or was not before the jury. If it be considered a part of the record, then it appears that both parties claim under R. B. Seay; that his conveyance to the defendant was executed on the 30th day of December, 1901, and admitted to record on the 5th day of December, 1903; and that his (Seay's) conveyance to the plaintiff was executed and admitted to record

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on the 22nd day of September, 1902. The failure of the defendant to record his deed until after the plaintiff had purchased the same land and recorded his deed, it is insisted by the plaintiff, rendered the defendant's deed void as to him under the provisions of section 2465 of the code.

That section provides, among other things, that a deed conveying land "shall be void as to subsequent purchasers for valuable consideration without notice \* \* \* until and except from the time it is admitted to record" in the proper county or corporation.

If a party claiming to be a purchaser of land for a valuable consideration without notice of a prior unrecorded conveyance can maintain an action of ejectment against the grantee therein, he can only do so by showing that he received his conveyance and actually paid the purchase money before he had notice of the prior unrecorded deed. Such proof is necessary in a court of equity, where the protection of a *bona fide* purchaser for value without notice is usually set up as a defense (*Lamar v. Hale*, 79 Va. 147, and cases cited; *Wasserman v. Metzger*, 105 Va. 744, 54 S. E. 893, 7 L. R. A. (N. S.) 1019, and cases cited; 2 Min. Inst. (4th Ed.) 767 &c.; 1 Perry on Trusts (5th Ed.) sec. 219); and, *a fortiori*, less proof would not be required of the plaintiff in an action of ejectment seeking to recover the land in the possession of the grantee in the prior unrecorded conveyance.

The plaintiff introduced in evidence his deed from R. B. Seay, which recited that it was made "in consideration of the sum of one thousand and fifty dollars, the receipt of which is hereby acknowledged." While the recital in the deed was evidence of payment against the grantor in the deed, it is not evidence on a question of this kind to affect the rights of the grantee in the prior deed; but the payment must be shown independently of the recital in the deed. As to such grantee, the recital is hearsay, and none the less so because in writing, and

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there is no reason why it should be evidence against a party who has no connection with the deed. *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 137, 140; 1 Perry on Trusts (5th ed.) section 219, cited in *Lamar v. Hale*, *supra*; *Henry v. Raiman*, 1 Casey (Pa), at p. 360, 64 Am. Dec. 703; *Snelgrove v. Snelgrove*, 4 Desausure, 287; Note in *Basset v. Nosworthy*, Vol. 2, Pt. 1, White & Tudor's Lead. Cas. in Eq. 100.

Neither the evidence introduced by the plaintiff nor that offered by him, which the court rejected, tended to prove that he had paid a valuable consideration for the land.

If the deed referred to in the declaration be not considered as a part of the record, then it does not appear that the plaintiff and defendant traced title to a common source, and the burden was upon the plaintiff to trace his title to the commonwealth, or in some other manner show that he was entitled to the possession of the land sought to be recovered as against the defendant. See *Leftwich v. City of Richmond*, 100 Va. 164, 40 S. E. 651; *Suttle v. R. F. & C. R. Co.*, 76 Va. 284; *Rhule v. Seaboard & C. Ry.* 102 Va. 343, 346, 46 S. E. 331; *Tapscott v. Cobbs*, 11 Gratt. 172.

The evidence offered by the plaintiff to sustain the issue on his part, if the court had permitted it all to go to the jury, would not have shown that he had title to the land in controversy, nor would it have shown that he had any right to the possession thereof as against the defendant. The verdict was, therefore, plainly right upon the evidence before the jury, and no other verdict could have been properly found upon the evidence offered by the plaintiff if the court had permitted it all to go to the jury. This being so, it is wholly unnecessary to consider the question, whether or not the court erred as to the admissibility of the rejected evidence.

Neither is it necessary to consider the question, whether the court erred in giving the instruction set out in the plaintiff's third bill of exception, because, as we have already seen, the

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plaintiff, in no view of the case which he made, or offered to make, was entitled to recover, and therefore could not have been prejudiced by the instruction. *Wright v. Bank*, 96 Va. 728, 32 S. E. 459, 70 Am. St. 889, and cases cited.

During the trial of the case, and before the jury had retired to consider of their verdict, in reply to the direct question of the plaintiff's counsel as to what the court would do if the jury found a verdict for the plaintiff after the parol evidence had been excluded, the judge replied from the bench that he would set aside the verdict. This action of the court is assigned as error.

If this was error, it was invited by the plaintiff, and he will not be permitted to complain of it here, especially as it did him no injury. *N. & W. Ry. Co. v. Mann*, 99 Va. 180, 37 S. E. 849.

We are of opinion that the judgment complained of should be affirmed.

*Affirmed.*

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**Richmond.****BOER WAR SPECTACLE v. COMMONWEALTH.**

January 16, 1908.

1. **TAXATION—License Tax—Scenic Performances—How Classified.**—A panoramic reproduction of the battles of the Boer war, with scenery of the war country and military and other equipments like those seen in the battle portrayed, unaccompanied by circus rings, trapeze acting, clowns or a menagerie, is not subject to the high license tax imposed upon "shows, circuses and menageries" mentioned in chapter 148 of Acts 1902-3, but to the lower tax imposed by said Act upon theatrical and other similar performances. The fact that the price of admission is the same as that charged by "circuses and other first class shows" is immaterial.

Error to a judgment of the Circuit Court of Henrico county, upon a petition to correct an alleged erroneous assessment of a license tax. To a judgment refusing to correct said assessment, the petitioner assigns error.

*Reversed.*

The opinion states the case.

*Page & Leary*, for the plaintiff in error.

*Attorney-General Wm. A. Anderson*, for the commonwealth.

HARRISON, J., delivered the opinion of the court.

The only issue in this case is whether the plaintiff is liable for the assessment of a license tax under section 109 of the



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revenue or tax bill, found in chapter 148 of acts of the General Assembly, 1902-3, pp. 205-6, or whether its liability for a license tax is under section 106 of such tax bill.

Section 109, under which the assessment was made, provides for the assessment of licenses to "Shows, Circuses and Menageries;" and stipulates for the payment of one hundred dollars for each performance of such show, circus or menagerie, if within a city, or within five miles of a city, of more than ten thousand inhabitants; and in addition thereto an amount equal to five *per cent.* of the gross receipts derived from such show, circus or menagerie. Section 106, under which the plaintiff in error claims to have been properly assessable with license, provides for the assessment of licenses upon "every theatrical performance, or any performance similar thereto, panorama, or any public performance or exhibition of any kind, except for benevolent and charitable and educational purposes, there shall be paid three dollars for each performance, or ten dollars for each week of such performance."

There is nothing in the evidence to sustain the conclusion that the exhibition in question was a "circus or menagerie," or a "show" of like kind. On the contrary, the undisputed proof is that the Boer War Spectacle was a panoramic, spectacular and dramatic performance of the kind referred to in section 106 of the revenue law. The entertainment given by plaintiff in error consisted of panoramic reproductions of three of the battles of the Anglo-Boer War. These panoramas, or dramas, were reproduced with the scenery of the Boer War country, and military and other equipment as nearly as possible like those seen in the battles portrayed.

The commissioner of the revenue who made the assessment complained of testified that the performances consisted of the portrayal of battles and military manoeuvres; that there were no circus rings, trapeze acting, wild beasts or clowns connected with the entertainment; and that his purpose, at first, was to

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issue the plaintiff in error a license under section 106, but that later on, finding from the bill posters that it was a "Boer War Spectacle," and that it intended to charge the same admission as "circuses and first-class shows," he levied the license under section 109.

Because the plaintiff in error charged the same admission fee exacted by a circus or other first-class show, furnished no warrant for assessing it as if it were a circus, menagerie or show of like kind. The testimony of this witness shows that the exhibitions under consideration embraced no feature of a circus, menagerie or like show.

The plaintiff in error was clearly assessable with a license tax under section 106 of Ch. 148, Acts 1902-3, p. 205.

The judgment of the circuit court sustaining the assessment made under section 109 of that act must, therefore, be reversed, and the case remanded for final order in accordance with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Richmond.****BLACKWOOD COAL & COKE CO., v. JAMES' ADMINISTRATOR.**

January 16, 1908.

1. **PLEADING—Declaration in Tort—Sufficiency.**—A declaration in tort is sufficient which states the facts with sufficient fullness and certainty to apprise the defendant of the demand made upon him, to be understood by the jury, and to enable the court to say, upon a demurrer, whether or not the plaintiff is entitled to recover, if the facts stated be proved.
2. **EVIDENCE—Dangerous Character of Animal—Opinion—Facts—Case at Bar.**—It being important to show the dangerous character of a mule, a witness who was asked to state the general character and condition of the mule, with reference to being wild, safe or dangerous, replied "she was a high strung mule, and a little fiery and headstrong, and she would not mind very well when you spoke to her." *Held:* The question is admissible. It does not call for an opinion, and the answer does no more than give to the jury such knowledge of the subject as the witness had, from which the jury could determine whether or not the animal was wild and dangerous, or safe.
3. **BILLS OF EXCEPTION—Skeleton Bill—Identification of Evidence.**—A trial judge cannot sign a skeleton bill of exception and direct the clerk to insert all the evidence introduced on both sides "as appears from the stenographer's report thereof." The evidence inserted must be, in some way, identified or ear-marked by the judge under his own hand. Otherwise it is no part of the bill and cannot be considered by an appellate court. The making of a bill of exception is a judicial act, and cannot be delegated.
4. **WITNESSES—Calling by the Judge.**—It is not the practice in this state for the trial court, of its own motion, to call a witness in a civil case whom neither of the parties have called.
5. **APPEAL AND ERROR—Failure to Certify Evidence—Instructions—New Trial.**—Objection to the action of a trial court in granting instructions, or in overruling a motion for a new trial, cannot be considered by this court when the evidence has not been certified.

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Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*R. Tate Irving, and Cabell & Cabell, for the plaintiff in error.*

*W. H. Werth and Henry & Graham, for the defendant in error.*

HARRISON, J., delivered the opinion of the court.

This action of trespass on the case was brought in the circuit court of Wise county by the administrator of Guy James, deceased, to recover damages for the death of his intestate, which is alleged to have been caused by the negligence of the Blackwood Coal and Coke Company. The trial in the circuit court resulted in a verdict and judgment in favor of the plaintiff, which we are asked to reverse and set aside.

We are of opinion that the demurrer to the declaration was properly overruled. Words and parts of a sentence are severed from their context and adversely criticised, but when the declaration is read as a whole, the objections urged appear to be untenable. The defendant was very clearly informed of the nature of the demand made upon it. The facts are stated with sufficient fullness and certainty to be understood by the defendant and by the jury; and the court, if the facts stated were proved, would be able to say upon demurrer whether the plaintiff was entitled to recover. *Wood v. American Nat'l Bk.*, 100 Va. 306, 40 S. E. 931; *Hortenstien v. Virginia-Carolina Ry. Co.* 102 Va. 914, 47 S. E. 906; *Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Lane Bros. Co. v. Seakford*, 106 Va. 93, 55 S. E. 556.

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Bill of exception No. 1 is to the action of the circuit court in permitting the witness Snodgrass, who was called on behalf of the plaintiff, to be asked during his examination in chief the following question: "I will ask you to tell the jury what was the general character and condition of that mule with reference to being wild, safe or dangerous, or what her habits were?" The objection to the question being overruled, the witness answered as follows: "She was a high strung mule, and a little fiery and head-strong, and she would not mind very well when you spoke to her." The objection urged to this question is that it required the witness to give his opinion of the mule.

This contention is not tenable. The mule in question was being driven by the plaintiff's intestate, and, on the plaintiff's theory of the case, it was important for the jury to be informed as to the mule's character, disposition and habits, in order that they might determine whether it was a wild, safe or dangerous animal. The question did not call for an opinion, but for a statement of facts based upon such knowledge as the witness possessed of the mule's character and disposition. Nor does the answer do more than give to the jury such knowledge of the subject as the witness had from which the jury could determine whether or not the mule was wild, dangerous or safe.

Before adverting to the three remaining bills of exception, it is necessary to determine whether the evidence adduced on the trial has been properly certified to this court.

It was doubtless intended to embody the evidence in a proper bill of exception, but this has not been done. The record shows that the judge signed a skeleton bill of exception, into which he directed the clerk to insert "all the evidence introduced by both the plaintiff and defendant as appears from stenographic report of the evidence." In making up the record, the clerk copied into this bill a paper purporting to contain the evidence, certifying at the close of the record, that "the foregoing is a true transcript of the record." There is, however, nothing to

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identify the evidence copied into the record as that adduced on the trial of the case at bar. It has no endorsement or other earmark put upon it by the judge to indicate that he had ever seen it or approved it in any way as a true transcript of the evidence. This it has been held repeatedly, is not sufficient to make the evidence a part of the record.

It is settled practice that the evidence is not a part of the record unless made so by a proper bill of exception. If the evidence is only vouched for by the clerk, it cannot be considered by this court. The making of a bill of exception is a judicial act and cannot be delegated. The trial judge must indicate his approval of the correctness of the evidence by authentication under his own hand. *West v. Richmond Ry. &c. Co.*, 102 Va. 339, 46 S. E. 330; *Jeremy Imp. Co. v. Com'th*, 106 Va. 482, 56 S. E. 224; *U. S. Min. Co. v. Camden &c.*, 106 Va. 663, 56 S. E. 561; *Cullen v. Nash*, 76 Ill. 515; *Stewart v. Rankin*, 39 Ind. 161.

Bill of exception No. 2 is to the action of the circuit court in calling, of its own motion, William Wells, a witness who had been summoned for the defendant, under the following circumstances: After the plaintiff and the defendant had each rested in chief, the plaintiff called the sheriff of Wise county, and asked him if he had summoned William Wells for the defendant, and if Wells was in attendance upon the court. An objection to this question was sustained; and thereupon the court, of its own motion, called the witness Wells and had him sworn, stating that either side might examine him. The plaintiff proceeded to examine the witness, and the defendant, without waiving its objection, cross-examined him.

So far as we are advised, it has not been the practice in this state for the court, of its own motion, to call a witness in a civil case; but it is not necessary, in this case, to consider or decide upon the right of the court to call the witness in question, because, as already seen, the evidence given by the witness is not

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before this court, and, therefore, it cannot be determined whether it was material or was in any way prejudicial to the rights or interests of the defendant. If error, it may have been harmless; and this can only be determined by an inspection of the evidence.

Certain instructions given by the court are objected to, and the refusal of the court to grant a new trial is also assigned as error; but these objections cannot be considered in the absence of the evidence which must be looked to in connection with each of them.

The judgment must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

CHILTON AND OTHERS v. HANNAH AND OTHERS.

January 16, 1908.

1. HUSBAND AND WIFE—*Tenancy by Marital Right—Liability for Debts.*—At common law the husband, immediately upon marriage, became entitled to the rents, issues and profits of the wife's freehold lands, independent of birth of issue. The right was vested by the marriage, and the interest of the husband was liable for his debts.
2. MARRIED WOMEN—*Property held under Act March, 1900—Liability for Husband's Debts.*—The Act of March, 1900, declaring that all property of married women theretofore or thereafter acquired should be free from the debts and liabilities of their husbands is, so far as it affects debts and liabilities of husbands created after the date of the act, a valid exercise of legislative power, although the act preserves the husband's right of courtesy. The legislature has power to abolish credit altogether.

Appeal from a decree of the Circuit Court of Appomattox county. Decree for the complainants. Defendants appeal.

*Reversed.*

The opinion states the case.

*Kirkpatrick & Howard*, for the appellants.

*Caskie & Coleman* and *H. D. Flood*, for the appellees.

HARRISON, J., delivered the opinion of the court.

The record in this case shows that, in 1869, Chapman H.



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Chilton and Mary E. Elliott were married, and that in the same year they came into the possession of 320¼ acres of land, which was the maiden land of the wife, having come to her under the will of her father, W. A. Elliott. The husband and wife are still living, and they have continuously occupied, used and enjoyed the property to the present time.

At common law, as soon as this property was turned over to Chilton and wife as the wife's share of the real estate of her father, the husband became entitled to the rents, issues and profits during the coverture. This tenancy of the husband by virtue of the marital right was independent of the birth of issue, depending only upon two conditions—the marriage, and the possession by the wife of a freehold estate. *Burks' Separate Estate*, p. 3; *Porter v. Porter*, 27 Gratt. p. 599, 602; *Garland v. Pamplin*, 32 Gratt. 312.

This right of the husband, by virtue of his marriage, to the rents, issues and profits of the wife's land during coverture was a vested right. *Dold v. Geiger*, 2 Gratt. 98; *Poindexter v. Jeffries*, 15 Gratt. 363. See also *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256, and note. Such an interest was at common law liable for the husband's debts. *Muse v. Friedenwald*, 77 Va. 62; *Garland v. Pamplin*, 77 Va. 305-314.

Whether or not it can be subjected to the payment of the judgments against the husband which are asserted in this case, depends upon the proper construction of the following statute, passed in March, 1900, (Va. Code, 1904, sec. 2286a) which, so far as it affects the case at bar, is as follows: "A married woman shall have the right to acquire, hold, use, control and dispose of property, as if she were unmarried, and such power of use, control and disposition shall apply to all property of a married woman heretofore or hereafter acquired; provided, however, that her husband shall be entitled to curtesy in her real estate when the common law requisites therefor exist, and he shall not be deprived thereof by her sole act; but the right to

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curtesy shall not entitle him to the possession or use, or to the rents, issues and profits of said real estate during the coverture; nor shall the property of the wife be subject to the debts or liabilities of the husband."

The judgments which are here sought to be enforced, were obtained in April, 1901, more than one year after the legislature had passed the act in question. It further appears that the foundation of these judgments was damages claimed against Chapman H. Chilton for insulting words published by him of and concerning the appellees, respectively. The judgments, therefore, are not based upon debts which existed against the husband prior to the act of March, 1900.

In our view of the case, we are not concerned with the question, whether or not the legislature has the power to take away from the husband his vested marital right. The husband is not complaining that he has been deprived of such right. Nor are we concerned with the legislative power to provide that the wife's property shall not be liable for the debts of the husband existing at the time such legislative declaration was made; for no such debts are here asserted. The sole question to be determined in this case is whether or not the legislature has the power to declare that the wife's property shall not be subject to the debts or liabilities of the husband arising after the passage of the act.

It is true, as contended, that the policy of this state is that property shall be liable to the satisfaction of the debts of its owner; but it is equally true that when the act in question was passed, the legislature could make exceptions as broad as it pleased. It had the power to abolish credit altogether. *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507.

There can be no question that the act of March, 1900, exempts the wife's property from liability for the husband's debts—not only property thereafter acquired, but the property she then owned and to which the husband's marital right had

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attached. What effect this provision might have, as impairing the obligation of the contract of a creditor, whose debt existed at the time the statute was passed, we need not decide. As applied to debts thereafter created, it did no one injustice.

It is contended on behalf of the appellants that they do not seek to subject the wife's property, which the act says shall not be liable, but that they ask to subject the husband's property, which is his vested marital right in the wife's property. A reasonable construction of the statute does not justify this contention. It was the purpose of the legislature to exempt from liability to the husband's debts the right of a married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, although the husband might then hold therein some right of present control. It was this same property, belonging to the wife when married, or subsequently acquired, and not part of it—no separate interest or estate in it—which was exempted from liability for his debts.

Further answering the contention of appellants, we cannot do better than to employ the language of Mr. Justice Miller in construing a similar statute passed by Congress for the District of Columbia. After declaring the contention here made to be a very narrow view of the statute, the learned justice, speaking for a unanimous court, says: "We are of opinion that the statute intended to exempt all property which came to the wife by any other mode than through the husband from liability to seizure for his debts, without regard to the nature of the interest which the husband may have in it, or the time it accrued, and that in regard to such debts, created after the passage of the law, no principle of law or morals is violated by the enactment. On the contrary, if we concede, as in the present case, that the husband had acquired a tenancy by curtesy in her property before such enactment, it is eminently wise and just that no other person should afterwards acquire such an interest in it as to disturb the joint possession of it, and turn the family re-

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sulting from the marriage out, that it may go to pay his debts." *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 28 L. Ed. 577, 4 Sup. Ct. 613.

For these reasons we are of opinion that, with respect to the judgments here asserted, the act of March, 1900, is valid, and, therefore, they cannot be enforced against the property sought to be subjected in this proceeding.

The decree complained of must, therefore, be reversed; and, this court proceeding to enter such decree as the circuit court should have entered, it is ordered that the bill be dismissed.

*Reversed.*

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Statement.

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**Richmond.**

COMMONWEALTH v. POCAHONTAS COAL & COKE CO.

January 16, 1908.

Absent, Harrison, J.

1. MINERAL LANDS—*Erroneous Assessment—Motion to Correct—Allegations not Denied—Corporation Commission.*—Where the notice of a motion under Sec. 437a of the Code (1904) to correct an erroneous assessment of mineral lands recites that it was given “as required by the State Corporation Commission,” which allegation is not denied, it must be accepted as true that the proceeding was instituted by the direction of said Commission.
2. MINERAL LANDS—*“Improved and Under Development.”*—The phrase “improved and under development,” as used in the statute for assessing mineral lands, means opened up mine entries and butt entries extending to solid coal, so as to render the land immediately accessible for practical mining.
3. MINERAL LANDS—*Value—Opinion of Trial Judge.*—The opinion of a trial judge as to the value of mineral lands for the purpose of taxation is entitled to great weight, where it appears that he resides in proximity to the lands, and saw the witnesses and heard them testify.

Error to a judgment of the Circuit Court of Tazewell county in a proceeding by motion on behalf of the commonwealth. Judgment for the defendant. Commonwealth assigns error.

*Affirmed.*

The opinion states the case.

*Attorney-General Wm. A. Anderson and T. C. Bowen, for the commonwealth.*

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*Henry & Graham, A. W. Reynolds and S. D. May, for the defendant in error.*

WHITTLE, J., delivered the opinion of the court.

This is a proceeding under Va. Code, 1904, sec. 437a, to correct the assessment for taxation for the year 1906 of certain coal lands owned by the defendant in error, situated in Tazewell county, Virginia.

The statute devolves upon the commissioners of the revenue the duty, on or before August 1, 1903, and every second year thereafter, on or before May 15, to specially and separately assess for taxation at their fair market value all mineral lands, fixtures and machinery thereon, within their respective districts; and to certify a copy of such assessment to the State Corporation Commission. The act also provides that if it shall appear that the property, or any of it, has not been assessed at its fair market value, the Commission shall direct the attorney for the commonwealth for the county or corporation in which the property is situated, to apply, in the name of the commonwealth, to the circuit court of the county, or the corporation court of the city, to have the assessment corrected. This writ of error is to the final order in the case made by the circuit court of Tazewell county.

In passing, we may notice the cross-error assigned by the defendant in error—namely, that the record fails to disclose such direction by the Corporation Commission as would justify the proceeding; and, consequently, that the circuit court was without jurisdiction to entertain the application.

In point of fact, the notice upon which the motion was founded recites that it was given "as required by the State Corporation Commission," which allegation was not denied, and must, therefore, be accepted as true.

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The commissioner of the revenue assessed the coal lands in question, consisting of 8,039.89 acres, as follows:

1,006.32 acres (barren land) at ...\$ 1.00 per acre;	
3,226.59 acres at .....	10.00 per acre;
1,112 acres at .....	15.00 per acre;
1,430.23 acres at .....	25.00 per acre;
1,264.75 acres at .....	100.00 per acre.

Commencing at the westerly boundary of the property, which is the least accessible to transportation, the commissioner assessed that portion, which, under present conditions, would likely be the last developed, at \$10.00 per acre; and the successive tracts at \$15.00, \$25.00 and \$100.00 per acre, respectively. The correctness of the valuation of the barren land is admitted; and the corresponding assessments by the circuit court advanced the \$10.00 and \$15.00 valuations to \$25.00, and left the assessment of the 1,264.75 tract at \$100.00 undisturbed.

The circuit court was of opinion that the commissioner's estimate of the value of the portion of the land "improved and under development" was too low, but that he had classified too large an area as "improved and under development." In the final result, however, the court reached the conclusion that one error about offset the other, and that substantial justice would be attained by allowing the original assessment of the 1,264.75 acre tract to stand.

It does not appear from the order just how much of the last-mentioned tract was regarded as "improved and under development," but there can be no question of the correctness of the court's conclusion that the entire boundary ought not to have been so classified. The evidence, though not altogether satisfactory as to values, shows that the defendant in error purchased these lands in the year 1901, at the average price of \$42.00 per acre; that they are bare of timber, except such as is useful for

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mining operations; and that \$1.00 per acre is the fair market value for surface utilization.

The entire property is held by the Pocahontas Collieries Company under a 100-years' lease, which period, it is estimated, under present conditions, will be required to mine and market the coal. It also appears that a variety of considerations enter into and control the extent of successful mining operations in these fields—notably, the demand for coal and facilities for transportation. Experience with respect to this particular property shows that it is not practicable, under existing circumstances, to mine a larger coal-bearing area than 85 acres annually, or 170 acres during the assessment period of two years. It, moreover, appears from the evidence that this section of the coal fields is wholly dependent upon the Norfolk and Western Railway system for transportation, and that the present demand for coal and allotment of coal cars to which this operation is entitled, would not warrant a more rapid development of the property.

The direct evidence on the subject discloses that only 250 acres of the 1,264.75 acre boundary are "improved and under development"—that is to say, a sufficient area of the larger tract has been opened up by mine entries and butt entries extending to solid coal to render 250 acres immediately accessible for practical mining.

The improvement and development of this character of property is necessarily accomplished by gradual process; and to meet changing conditions, the legislature has wisely provided biennial assessments, so that the commonwealth may reap the benefit of progressive improvement and development on the one hand, and allow fair deduction to the tax-payer for lands that have been rendered barren on the other.

Adopting the foregoing criterion as a reasonable and correct exposition of the phrase "improved and under development," conformably to the evidence in the case, we are of opinion that there is no error in the order complained of.



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Our attention has been called to the recent decision of this court in *Interstate Coal & Iron Co. v. Com'th*, 103 Va. 586, 49 S. E. 974, as promulgating a different rule for ascertaining the quantity of mineral lands "improved and under development." But the facts of the two cases are diverse.

The court in that case was dealing with a comparatively small coal-bearing area, susceptible of being mined in a few years. The property was also equipped with coke ovens; and the evidence showed that where two-thirds of the coal is converted into coke, it is a fair estimate to classify two acres to each coke oven as "improved and under development."

Here, we are confronted by essentially different conditions. The boundary under consideration includes over eight thousand acres of land, which, it is not denied, will require more than a century to mine. Besides, it was stated in argument, and not controverted, that the coke ovens, tipples, and other improvements employed in connection with this and other operations are not located on the property of the defendant in error, but on adjoining lands of the lessee. So, the standard adopted in the case referred to is neither available nor applicable in this instance.

In conclusion we may remark, that the proximity of residence of the learned judge of the circuit court to the coal fields, and the fact that he saw the witnesses and heard them testify, which gave opportunity to form a correct estimate of their intelligence and credibility, are factors which entitle his opinion to great weight. His finding is sustained by the evidence, and ought to be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.****KNIGHTS OF COLUMBUS v. BURROUGHS' BENEFICIARY.**

January 16, 1908.

1. **APPEAL AND ERROR**—*Record—Instructions—Bills of Exception.*—Instructions not made a part of the record by a proper bill of exception in the trial court cannot be considered by this court.
2. **BENEFIT SOCIETIES**—*Non-Payment of Dues—Forfeiture.*—The non-payment of dues and assessments in a beneficial association organized for the purpose of fraternal insurance, and not for gain or profit, tends to the destruction of the association, and is a violation of the member's duty as a corporator. Not only has the association an inherent right to expel members for non-payment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws that such non-payment, within a specified time after notice, shall, without personal or other notice to the delinquent member, *ipso facto*, work a forfeiture of all the member's rights of membership.
3. **BENEFIT SOCIETIES**—*Membership—Forfeitures—Notice of By-Laws.*—A party who takes out a policy in a mutual benefit society becomes a member of the society, and is bound by the rules and provisions of its charter and the by-laws lawfully made in pursuance thereof, and is conclusively presumed to have knowledge of them all. If these provide that the non-payment of dues and assessments for a specified time after notice shall *ipso facto* forfeit his membership in the society, the provision is binding on him, and, if not waived, no further steps on the part of the society are necessary to render the forfeiture effective.
4. **BENEFIT SOCIETIES**—*Forfeitures—Irregular Payment of Dues by Local Council—Case at Bar.*—The by-laws of a benefit society provided that any member should *ipso facto* forfeit his membership who failed, neglected or refused to pay his assessments within a time specified in the by-law. They also provided that no money should be paid or transferred from the treasury of any council except upon

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a two-thirds vote of the members present and voting at a regular meeting held after notice at a previous meeting of an intention to pay or transfer such money. A local or subordinate council kept alive the membership of all its members by paying their dues by checks drawn by the financial secretary on the treasurer against the insurance fund, but not in accordance with the by-law last above mentioned. A member of a local council, whose dues and assessments had been thus paid, had failed to pay his assessments for six months, though notified, on an average, twice a month. Some time afterwards he became ill, and four days before his death there was paid to the financial secretary of the local council the full amount of all dues and assessments theretofore advanced for him by the local council. Upon his death, the society refused to pay the amount of his policy on the ground that his policy was forfeited by reason of his failure to pay his dues and assessments within the time required by the by-laws.

*Held:* There can be no recovery on the policy. The member by failing to pay his assessments as required by the constitution and by-laws *ipso facto* forfeited his membership in the society. The subordinate local council, in undertaking to make good the delinquencies of its members, by warrants drawn by its financial secretary on the insurance fund, without complying with the by-laws of the society, acted without authority; that in so doing it was the agent of its members, and not of the society, and the society having received the money in ignorance of the facts, has not waived the forfeiture, and is not by its conduct estopped to set it up in defense to this action.

Error to a judgment of the Corporation Court of the city of Alexandria in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Crandall MacKay* and *Wm. B. Reilly*, for the plaintiff in error.

*John M. Johnson* and *Leo P. Harlow*, for the defendant in error.

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KEITH, P., delivered the opinion of the court.

This suit was brought by Mary A. Burroughs, as beneficiary of William J. Burroughs, deceased, in the corporation court of the city of Alexandria, against the Knights of Columbus; a corporation incorporated under the laws of the state of Connecticut, and doing business in the state of Virginia. The defendant appeared and pleaded non-assumpsit and two special pleas. The plaintiff took issue upon the first plea and filed special replication to the second and third pleas. Issue was joined thereon. The jury gave a verdict for the plaintiff for the sum of \$1,000. The court rendered judgment upon that verdict, and the case is now before us upon a writ of error.

The plaintiff in error here (defendant in the court below) assigns as error the ruling of the court in granting three instructions asked for by the defendant in error, as shown by bill of exception No. 1. Upon referring, however, to that bill, it appears that only one instruction is mentioned, which is in the following words:

"The jury are instructed that the local lodge had the power to advance assessments for its delinquent members, unless there was something in the constitution and by-laws of the national or subordinate council prohibiting such advances."

If other instructions were given at the instance of the plaintiff, they are not properly part of the record and cannot be considered by this court. At the conclusion of the printed transcript of the record, it does appear that three instructions were granted at the instance of plaintiff. We have quoted instruction No. 1, and instructions Nos. 2 and 3, not having been embraced in the bill of exception, cannot be considered by us.

From bill of exception No. 2 it appears that the court was asked to grant plaintiff in error three instructions, which the court refused to do, and its refusal is assigned as error. These instructions are as follows:

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"The court instructs the jury that if they believe from the evidence that William J. Burroughs failed, neglected or refused to pay his assessment for the months of April, May, June, July, August and September, 1904, in the time prescribed by the by-laws, that being the regular monthly assessment due by him, and after he had been requested to pay same by Richard L. Carne, Jr., the financial secretary of Fitzgerald Council No. 459, Knights of Columbus, that then he forfeited his membership in the Knights of Columbus, and the plaintiff cannot recover in this action.

"The jury are further instructed that, as a matter of law, the receipt of said money by the said Carne, financial secretary of Fitzgerald Council, No. 459, Knights of Columbus, on behalf of said William J. Burroughs, was without right or authority on his part, and that the acceptance by him of said money was not a waiver of the conditions by the said defendant under which said benefit certificate was issued. To the contrary each and every benefit certificate is issued only upon the conditions stated in and subject to the constitution and by-laws of the Order of said Knights of Columbus.

"The jury are further instructed that the said Richard L. Carne, Jr., as financial secretary of the said Fitzgerald Council No. 459, Knights of Columbus, and said Fitzgerald Council No. 459, Knights of Columbus, in administering the powers and duties provided under the laws of said defendant, were not the agents of the said order, but the agents of the members thereof, and that the acceptance of said money by said Carne after said forfeiture of membership of said William J. Burroughs, did not create, or cannot be construed to create any liability on the part of said defendant to said plaintiff. Therefore, the verdict should be for the defendant."

The evidence before the jury, in the light of which these instructions are to be considered, was as follows: The Knights of Columbus is a corporation organized under the laws of the state

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of Connecticut, for the purpose of carrying on a system of fraternal insurance, by means of subordinate lodges located throughout the various states of the Union. Of these subordinate lodges one was known as Fitzgerald Council, No. 459, located in Alexandria, Virginia. One of the members of this council was William J. Burroughs, who made application for membership on April 14, 1902, and to whom a benefit certificate was issued on the 25th day of June, 1902. By the terms of this certificate, Burroughs agreed to comply with all the requirements and conditions therein set out, and also those contained in the original application made by him for membership in the organization. He agreed to comply with the constitution, laws, rules and regulations governing the defendant order; and the defendant agreed to pay to the beneficiary, plaintiff in this action, Mary A. Burroughs, the sum of \$1,000, provided the said William J. Burroughs was at the time of his death, a member of said order in good standing; all of which conditions and provisions were accepted and subscribed to by Burroughs in his benefit certificate. Burroughs, during the time of his membership, agreed to pay certain assessments, as provided for in defendant's laws, Secs. 85 and 89. There was due from Burroughs an assessment for the month of April, 1904, for the sum of eighty cents, which was not paid; nor were the assessments paid for the months of May, June, July, August and September, 1904. Section 167 of plaintiff in error's by-laws provides: "Any member of this order shall *ipso facto* forfeit his membership in the order, who fails, neglects or refuses to pay his proportionate part of any assessment for thirty days from the date of mailing or transmitting the notice for assessment by the secretary of his council, or of the regular monthly assessment, within thirty days from the first day of the month in which levied."

By section 217, it is provided: "A member of the order suspended for non-payment of assessments, dues or fines, wishing

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to be reinstated, must within one year from the date of suspension, make written application to and at a meeting of the council from which he was suspended, upon a blank issued by the order. Said application shall be balloted upon and forwarded by the financial secretary to the national secretary, with the approval or disapproval of the council recorded thereon, and with the certificate of the financial secretary that all arrearages of assessments and dues have been paid. If an insurance member, the committee on reinstatement shall then act upon said application, and the applicant can only be reinstated upon such conditions as said committee may direct and determine, provided if such application is made within three months from date of forfeiture of membership, the provisions of this section relative to ballot and approval by the council, shall not apply. If an associate member, no action of the committee on reinstatement is necessary. Upon approval of the council and otherwise complying with this section he is reinstated."

By section 125 of the by-laws, it is provided: "No money shall be paid or transferred from the treasury of any council (except such moneys as the council is called upon to regularly pay for its current expenses and as provided by the laws of the order, or for purposes approved by the national council or board of directors) unless by a two-thirds vote of the members present and voting at a regular meeting held subsequent to a regular meeting, at which notice in writing of a resolution or intention to pay or transfer such money and the purposes and amount to be paid or transferred shall have been given and regularly read."

The benefit certificate copied in the record appears to have been issued on the express condition that the statements made by the applicant in his application for membership are warranted as true and made a part of the contract, and upon the further condition "that said member complies in the future with the constitution, laws and regulations now governing said order,

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or that may hereafter be enacted to govern said order." And in section 12 of his application he covenants that he "will conform to and abide by the constitution, by-laws, rules and regulations of said order, and of any council thereof, of which I may at any time be a member, which may now be in force, or which may at any time hereafter be adopted by the proper authorities, or submit to the penalty now or hereafter provided for the breach or violation of such constitution, by-laws, rules or regulations."

William J. Burroughs died on October 15, 1904. He had failed to pay his assessments for the months of April, May, June, July, August and September, 1904. It was shown by the evidence of the financial secretary of Fitzgerald Council that it was the custom of that council to keep up the dues of members who were in arrears—to use his own language: "The council ordered me to carry every man. That was passed at every meeting for every assessment. It was always paid within thirty days. Before I would have a chance to read the delinquent list, a motion would be made that we carry the delinquents"—that this action was taken by the local board, knowing that some of the members were delinquent, and before a list of the delinquents could be read a motion would be made to carry them all. These payments for Burroughs and other delinquents were made by warrants, drawn on the treasurer against the insurance fund.

It appears from the evidence of the financial secretary, that he called upon Burroughs frequently for his assessments, and he would do so upon an average of twice a month—at his home, at his place of employment and elsewhere.

The defendant in error proved by another witness that it was the custom for the secretary of the national council to forward to the Fitzgerald Council a statement of the amount due for insurance members, and the secretary of the local council would then forward the amount by check; that the local lodge kept



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alive the membership of all its members by paying their dues; that up to the time of the death of Burroughs the local council had carried members from month to month and paid the assessments out of the general fund; and that Burroughs had been asked to meet the assessments due by him, and he always replied that he would do so at the next meeting—he never in terms refused to pay.

It further appears that the secretary of the national council had no knowledge of the custom of the local council, and when he received checks was not aware that they were in part for money advanced to meet the assessments of delinquent members of the subordinate lodge.

Some time after Burroughs, the insured, became ill, and four days before his death, to-wit: on October 11, 1904, the sum of \$10.40 was paid to the financial secretary of the Fitzgerald Council, in settlement of the amount that lodge had theretofore advanced to the national council on account of assessments against William J. Burroughs.

The Knights of Columbus is a beneficial association, organized for the purpose of carrying on a system of fraternal insurance and not for purposes of gain and profit. The non-payment of dues and assessments, in such an organization, is subversive of the fundamental object of the society, tends to its destruction, and is a violation of the member's duty as a corporator. Not only has such a society an inherent right to expel members for non-payment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws, that such non-payment, within a stipulated time after notice, shall, without personal or other notice to the delinquent member, *ipso facto*, work a forfeiture of all the member's rights of membership. Niblack on Ben. Soc. & Accident Ins., (2nd ed.) section 39.

In *Klein v. Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662, it is said: "A condition in a policy of life insurance, that if the stipulated

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premium shall not be paid on or before a certain day, the policy shall cease and determine, is of the very essence and substance of the contract. Against a forfeiture caused by failure to pay, a court of equity cannot relieve."

And in *Thompson v. Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765, it is said: "Where the policy provides that it shall be forfeited upon the failure of the assured to pay the annual premium *ad diem*, or to pay at maturity his promissory note therefor, the acceptance by the company of the note, although a waiver of such payment of the premium, brings into operation so much of the condition as relates to the note." "Prompt payment," said the court, "and regular interest constitute the life and soul of the insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all."

In *Metropolitan Life Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345, it is said: "An insured should look at his policy and conform to it, and limitations of the agent's authority should be effective, unless the insurance company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver. An agent to collect premiums has no authority to extend the time of payment of an over-due premium, and where the policy declares a forfeiture for failure to pay at maturity, and forbids waiver by agents, their agreements to extend time of payment do not, as a rule, bind the company." See also *United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552.

In *Mut. F. Ins. Co. v. Miller Lodge, I. O. O. F.*, 58 Md. 463,

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it was held, that "When a party takes out a policy in a mutual insurance company, and the contract is complete, he at once becomes a member, and is bound by the rules and provisions of the charter and by-laws of the company, and he is presumed to have knowledge of them all. \* \* \* Although there may be a habit or usage of the company to give notice to the members of the amount of the annual interest, and the time of payment; yet, if no obligation to give such notice is created by the charter or by-laws of the company, there is nothing in such habit or usage that could impose such a duty upon the company, with the consequences of making the notice a condition precedent to the right of the company to receive the interest on the premium note, according to the contract of insurance. The company is under no obligation to give such notice, and assumes no responsibility in giving it. The duty of the assured to pay at the day is the same, whether notice be given or not."

Applying the principles of that case to the one before us, there can be no doubt that the insured was bound by the rules and provisions of the charter and by-laws of the order of which he was a member; and that he was conclusively presumed to have knowledge of them all; with this difference between the two cases, that in that under consideration there is no evidence of any habit or usage of the national council to grant indulgence to its members, or to give them notice of delinquency; or that there was any obligation upon its part to do so, or any knowledge that any such usage or habit had grown up in and was practiced by the local lodge.

In *Rood v. Ben. Asso.*, (C. C.) 31 Fed. 62, it is held, that where the laws of a benefit society provide, that if a member neglects or refuses to pay any assessment for a specified period, he shall cease to be a member, and the secretary shall strike his name from the roll, such laws are self-executing, and the member so omitting to pay loses his rights as a member, although the secretary does not strike his name from the roll.

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In *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87, section 1, art. 10, of the by-laws of the association, provided that, if any member should neglect to pay any dues or assessments required by the by-laws, "that then and in such case such membership shall cease and determine at once without notice, and all claims be forfeited to the association." It was held, that the neglect to pay an assessment for thirty days after notice thereof, *ipso facto*, determined the membership of the delinquent.

In *Illinois Masons' Benevolent Society v. Baldwin*, 86 Ill. 479, it was held: "Where a certificate of membership in a society, which provides for paying a certain sum of money on the death of the member, also requires the party to pay all assessments against him within ten days after notice thereof, or the certificate shall be null and void, and the by-laws of the society provide that a party failing to pay his assessments within ten days after notice shall forfeit his membership and all benefits therefrom, and the party, in his application for membership, agreed to be bound by the rules and regulations of the society, a failure or neglect to pay an assessment, within ten days after notice of the same, will prevent any recovery upon the certificate upon his death, unless there is shown a waiver of the forfeiture, or facts estopping the society from insisting upon the same;" that "when a party in default in the payment of assessments against him, as a member of a benevolent society, has not been induced by the society or its agents to do, or to omit to do, any act which he would not otherwise have done or omitted, the society will not be estopped from insisting upon a forfeiture of his rights for his neglect to pay. Proof of a custom is never admitted to overcome or change the express terms of a contract. Proof by a witness that in certain instances known to him a forfeiture was not exacted, without showing this to be uniform and its duration, is not sufficient to show a custom."

While the authorities concur in conceding the right of bene-

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ficial societies in their constitutions and by-laws, and in their contracts of insurance, to impose conditions, a failure to comply with which is visited with a forfeiture of all rights in the society, there is some apparent diversity of opinion among the cases, as to whether or not it is necessary for the society to give notice or take any formal action in order to make the forfeiture effectual. But it will be found, we think, upon a careful examination of the authorities, that the difference really grows out of the construction of the constitution and by-laws of the particular society. If, for instance, the laws of the society provide that the non-payment of an assessment, continuing for a specified time, shall operate *ipso facto*, to determine the connection between the society and the delinquent member, and to forfeit his rights as such member, we know of no case in which the power of such a society to make and enforce such a rule has been denied; but where, in accordance with the terms of the constitution and by-laws of the society, anything is to be done on the part of the society itself to make the expulsion of the member complete to terminate his rights and interests in the society, the courts require a strict compliance with the course of procedure prescribed, and are astute to discover any departure which will enable them to interfere and prevent a forfeiture.

For example, in *Madeira v. Merchants' Exchange Mut. Ben. Soc.*, (C. C.) 16 Fed. 749, where a certificate of membership in the nature of a life policy, issued by the mutual society, provided that the amount of insurance therein specified should be paid in case of the member's death to his beneficiary, on condition that he had "complied with the by-laws of the society," and the by-laws provided that members should forfeit their membership if they failed to pay their dues within thirty days of the forfeiture, or facts estopping the society from insisting after publication of an assessment, and it appeared from the evidence that the assured had failed to pay an assessment within

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the time specified, and that it remained unpaid at the time of his death, it was held that he had forfeited his membership, and that there could be no recovery under his certificate.

So, in *Borgraeve v. Supreme Lodge, Knights and Ladies of Honor*, 22 Mo. App. 127, it was held, that "Under a law of a benevolent society, which makes the non-payment of assessments for a given period after notice operate as a suspension *ipso facto* of the delinquent member, it is not necessary that the suspension should be judically determined by any judicatory of the order."

In *Bacon on Ben. Soc. & L. Ins.*, Vol. 2, sec. 385, after a full consideration of the subject and the citation of numerous authorities upon the one part and the other, the conclusion is reached, that "If, by the laws of the society, non-payment of an assessment operates as a forfeiture, time is of the essence of the contract, and the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time. \* \* \*

The question is one of construction, and we give in a note the cases not heretofore cited, holding that *ipso facto* suspension resulted from non-payment, and also those holding to the contrary." An examination of these diverse authorities will show that in every case in which it was held that the failure to pay did not operate a suspension *ipso facto* there was something in a just construction of the constitution and by-laws which showed that affirmative action on the part of the society was necessary; in other words, that in all such cases, the non-payment of the dues and assessment did not, under the particular constitution or by-laws, operate *ipso facto* and by its own force to terminate membership in the society.

In concluding the discussion of this branch of the case, we shall refer to section 289 of *Niblack on Ben. Soc.* (2nd ed.): The whole of the section is pertinent, but too long for quotation. It is in part as follows: "However abhorrent it may be to all

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reason to permit the expulsion of a member without notice and hearing, or opportunity to be heard, for an alleged violation of his duty as a citizen or a corporator, and notwithstanding the fact that a by-law providing that on such charges a member may be expelled by a vote of the society in his absence and without notice is illegal and invalid, it may be laid down as certain that, from the very nature of the plan of mutual assessment insurance, it is proper for mutual benefit societies to provide that non-payment of an assessment within a specified time after notice shall, *ipso facto*, work a forfeiture of the insurance and an expulsion of the defaulting member. It is true that where such stringent clauses of forfeiture are made a part of the contract, they are usually accompanied by provisions for the reinstatement of the delinquent member upon equitable terms, but such provisions are not necessary to the validity of the terms of forfeiture. These societies depend exclusively upon the payment of assessments to meet their losses and expenses, and only by the prompt payment of assessments by their members can they maintain their solvency and responsibility. The only practical way which they have of enforcing payment of their assessments is by forfeiting insurance contracts and expelling the delinquent members for non-payment, and this power is necessary for the existence of such societies. To hold that specific notice to the member must be given of the time and place at which he will be called upon to answer the charge of having failed to pay his assessment within the stipulated time, and that a judicial act of the society expelling the delinquent member is necessary in order to terminate his rights under the contract, and to hold further that such proceedings may not be waived by express contract of the parties, would be to extend unduly the period of insurance beyond the time for which a consideration had been paid, would offer encouragement to careless members, and greatly impair the ability of the societies to carry on the work for which they are organized."

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In *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322, Judge Riely, speaking for this court, said: "The forfeiture of a certificate in a benefit society is not waived by the fact that the financial reporter of a subordinate lodge is in the habit of receiving payment of assessments after the end of the month for which they are levied, and within which they are payable, under the penalty of suspension and a forfeiture of the benefit certificate, when there is no evidence that the supreme lodge, which is sued on the certificate, is aware of such habit."

In *Supreme Council Royal Arcanum v. Taylor*, (C. C. A.) 121 Fed. 66, the court says: "A fraternal benefit association cannot be deemed to have waived a condition of its contract with a member requiring the payment of an assessment on or before the last day of each calendar month, without notice, and which provided that in default of such payment the member should stand suspended, and prohibited the collector of the local council from receiving an assessment after the day it became due; nor was it estopped to insist upon such suspension, which occurred some days before the member's death, because on some previous occasions he had paid after the close of the month, where that fact was not reported to the local council nor known to the supreme council, but where, in fact, the assessment had in each case been advanced for him by the collector under an arrangement between them."

In *Modern Woodmen of America v. Tevis*, (C. C. A.) 117 Fed. 369, the court says: "Stipulations to insure the prompt payment of benefit assessments constitute the substance and the essence of insurance contracts of beneficial associations;" and that "the insured and the beneficiaries under contracts with insurance companies and beneficial associations are charged with knowledge of the limitations upon the powers of the agents of the companies which are found in the policies or certificates or in the by-laws or applications which are a part of their contracts, and they are bound by these limitations."



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In that case the by-laws of the Modern Woodmen of America, which constituted a part of the contract with its members and beneficiaries, provided that a member who fails to pay a benefit assessment at the time specified for its payment, is *ipso facto* suspended, and his benefit certificate is thenceforth void; that he may be reinstated within a certain time, if in good health, by furnishing a warranty of that fact, and paying his arrearages; that the clerk of the local camp shall collect and remit to the head camp the assessments paid in accordance with the by-laws; that he shall report to the head camp suspended members; that he is the agent of the local camp and not of the head camp; and that no act or omission by him shall create any liability or waive any immunity or right of the society. It was held, that the clerk of the local camp is the agent of the head camp to collect and remit the benefit assessments in accordance with the terms of the by-laws; that his authority is limited by the by-laws, and the members and beneficiaries are charged with knowledge of these limitations, because they are a part of their contracts; and that the clerk of the local camp has no authority by contract, estoppel, or waiver, to bind the society to its members or beneficiaries either by extending the time of payment of a benefit assessment, or by waiving default in its payment, or by reinstating a suspended member without a warranty of good health, in the absence of notice or knowledge of such acts and acquiescence therein by some of the principal officers of the head camp.

There is much in that case which resembles the one under consideration.

In *Jelly v. Muscatine City and County Mut. Aid Society*, 120 Ia. 689, 95 N. W. 197, 98 Am. St. Rep. 378, it was held that "a provision in the constitution of a mutual benefit society that a member failing to pay his assessment within fifteen days after being notified by the secretary shall be suspended, is not a self-executing provision, and a member who has failed to pay

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within the time is still in good standing, no action having been taken to suspend him." Construing this provision of the constitution, the court says: "The expression 'shall be suspended,' as the same appears in said article, is declaratory merely of the right of the association to suspend for non-payment of assessments, and it cannot be said that membership or standing has been lost or forfeited as long as the society does not see fit to exercise such right. A mere delinquency of a member of a mutual benefit association to pay dues or assessments does not defeat his good standing as long as he has a right to pay and the association forbears to take action." Citing among other cases *Petherick v. Order*, 114 Mich 420, 72 N. W. 262.

In *Warwick v. Supreme Conclave, Knights of Damon*, 107 Ga. 115, 32 S. E. 951, it was held, that "the non-payment of an assessment made upon the member for the common benefit fund, which has become due and payable under the laws of the association, will not, *ipso facto*, amount to a forfeiture of the benefit of life insurance provided for in the certificate, it appearing that there is no law or rule of the association expressly providing that such non-payment will of itself work a forfeiture."

In *Puhr v. Grand Lodge German Order of Harugari*, 77 Mo. App. 47, it was held that, under the constitution and by-laws of the defendant society, a mere delinquency in the payment of dues does not defeat the good standing of a member. "So long as the member has a right to pay and the lodge forbears to take action, he remains in good standing." The provision of the by-laws in that case was that "Members who owe three months' dues and assessments shall, in the first meeting of the fourth month, be stricken from the membership roll." The court was of opinion, that under that section, the delinquency of the member would not, *ipso facto*, result in a forfeiture of membership until the first meeting of the local lodge in the fourth month after the default; and that a construction which summarily de-

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prives the member of his rights is not favored, and it will not be adopted if any other is possible."

In *American Council, O. U. A. M. v. National Council, O. U. A. M. of the U. S. of America*, 63 N. J. L. 52, 43 Atl. 2, a by-law provided, that if a member should fail to have his assessments in the hands of the secretary within thirty days from the date of call, he should forfeit his right to receive benefits until all arrearages were paid, and that if thirty days should elapse before all arrearages were paid, the member should be suspended from the department. It was held, that "a failure to pay assessments within thirty days after they became due did not of itself operate to suspend the defaulting member, but that affirmative action on the part of the society was required to produce that result." The court in its opinion laid stress upon the expression "shall be suspended," contending that action is to be taken by the national council for the accomplishment of that result, after the default has continued for the specified time, and until such proceedings are taken and completed, the local council still retains its membership in the department."

All of which goes to show, that, as we before remarked, courts are astute (and we may add properly so) to discover modes of escape from declaring a forfeiture. To the same effect see *Order of United Commercial Travelers v. McAdams*, (C. C. A.) 125 Fed. 358; *LaMarsh v. Society*, 68 N. H. 229, 38 Atl. 1045.

It will be sufficient to recur to section 167 of the by-laws of the Knights of Columbus to show that there is no room for discussion or doubt as to the effect of a failure to pay an assessment for the stipulated period. "Any member of this order shall *ipso facto* forfeit his membership in the order, who fails, neglects or refuses to pay his proportionate part of any assessment for thirty days from the date of mailing or transmitting the notice for assessment by the secretary of his council, or of the regular monthly assessment, within thirty days from the first day of the month in which levied."

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This brings us to a proposition much relied upon by defendant in error. As we understand her position, she did not rely, and under the evidence in this case could not have relied upon any waiver or estoppel upon the part of plaintiff in error. The defendant in error stands squarely upon the proposition, that the Fitzgerald Council had the right to pay, and did pay, the dues and assessments of its members; that the payment of all the dues of all its members by the local council to the national council satisfied all legal demands of the national council; and that, as the amount which the local council had advanced on behalf of Burroughs was during his lifetime paid to and received by it, he died a member in good standing.

In *O'Grady v. Knights of Columbus*, 62 Conn. 223, 25 Atl. 111, the construction of the constitution and by-laws of this society, as they then existed (that case having been decided in 1892) became necessary. One of the regulations of the society at that time provided that the endowment should be paid "upon the death of any member \* \* \* in good standing at the time of his demise," and that a member should "be deemed in good standing for the purpose of claiming endowment who at the time of his death was not indebted to his council." Another article provided, that "members four months in arrears for dues shall be *ipso facto* suspended," and that "members legally suspended shall not be entitled to any of the privileges of membership whatever until reinstated according to law." It was held that the right of the beneficiary of a deceased member to recover the endowment depended on the question whether the member, at the time of his death, was indebted to his council, and not upon the question whether he had been suspended and not reinstated. In that case the member, at the time of his death, was indebted to his council for several assessments, and had been suspended and not reinstated. A few hours before his death his beneficiary paid the amount due to the financial secretary of his council and took a receipt for it. It was held that

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this payment did not effect a reinstatement of the member; but that it did extinguish his indebtedness to his council, so that at the time of his death, he was not indebted, and his beneficiary was entitled to the endowment.

Since that case was decided, the laws of the order have been amended, and as amended, again came under the consideration of the Supreme Court of Connecticut, in the case of *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. Rep. 223, where it was held that "The terms of a contract between a member of a benefit society and the society stipulating that the member agrees to subject himself to the constitution and by-laws of the order, are determined by the constitution and by-laws of the order, as existing when the member became a member, and as amended from time to time." It appeared in that case that, notwithstanding the constitution and laws of the society, it had been the practice for a long time of the members of subordinate councils not to pay their monthly assessments until required to do so by a collecting officer appointed by the council, and it had been the practice of its financial secretary to receive the money so paid after the expiration of thirty days from the first day of the month, and not to state in his monthly report to the national secretary the fact that certain members had paid their assessments after the time prescribed by law for payment had expired. The national secretary, with knowledge of this practice, continued to issue each regular monthly assessment against the subordinate council, based upon the number of insurance members of the council as thus reported to him by the financial secretary, and to receive and accept from the treasurer of that council the full amount of each such monthly assessment. This practice continued with the knowledge of the other officers of the order charged with duties in connection with issuing and receiving assessments for the death benefit fund against the subordinate council. A similar practice had for a long time prevailed in the other councils of the order in respect to the pay-

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ment by their members of their regular monthly assessments, and a similar practice, with respect to the issue and collection of assessments against the other councils of the order, had, in like manner, prevailed. Coughlin, knowing of this practice, in fact, believed that he was not required to pay his monthly assessment within thirty days from the first day of the month, and that he might lawfully pay the same after the expiration of that time, so long as he paid when requested so to do by the proper officer of his council; and, acting on this belief, he did not pay the assessments mentioned in the answer within thirty days from the first day of the month, but did pay the same after the expiration of that time to the financial secretary of his council. The court, in its opinion, says: "The foregoing facts are alleged in the reply, and for the purpose of testing its legal sufficiency are admitted by the demurrer;" and held, that "The laws of a fraternal benefit society providing for a monthly assessment against each subordinate council on the number of its members as reported monthly, payable immediately after the first day of the month, and that each member of a council should pay his regular monthly assessments within thirty days from the first day of each month, under penalty of *ipso facto* suspension for failure to so pay, the payment by the treasurer of a subordinate council of the monthly assessment immediately after the first day of each month was not a payment by any member of the council of his individual monthly assessment;" and that "the fact that a member believed that a violation of the laws of the society was justified did not save him from the penalty of suspension; that a subordinate council could not waive the conditions on which a member's benefit certificate was issued, or change the provisions of the laws of the order with respect to the time of payment of monthly assessments; and that the officers of the society in dealing with the members thereof were acting as special agents under a special authority, the limits of which were known to the members, and their acts in allowing members

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to pay assessments after the time fixed did not operate either by way of waiver or estoppel to prevent the society from maintaining a defense to an action on a benefit certificate based on the failure of the member to pay a monthly assessment within the time fixed; that the fact that a subordinate council adopted a practice of not requiring its members to pay their monthly assessments until required to do so by a collecting officer, appointed by the council, and the financial secretary received the money so paid after the expiration of thirty days after the first day of the month, did not effect a change in the laws of the society, which, under its terms, could only be changed by the national council."

It needs no comment to show that the case just cited is immeasurably stronger on behalf of the beneficiary than the case under consideration. See *Grand Lodge, Ancient Order United Workmen v. Cressey*, 47 Ill. App. 616.

In *Borgraefe v. Supreme Lodge, &c.*, *supra*, it was held, that "The beneficiaries of a member of a benevolent society who stands suspended for non-payment of assessments, by operation of the laws of the society, at the time of his death, cannot recover on the benefit certificate on the ground that the subordinate lodge of which he was a member had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge, for which it had extended him credit."

In *Grand Lodge, Ancient Order United Workmen v. Jesse*, 59 Ill. App. 101, a member of a subordinate lodge failed to pay an assessment, and his certificate, by operation of the rules, became suspended. These rules provided that it might be renewed within a period of three months from the date of suspension, upon the condition that all assessments made during the time of suspension should be paid, and if not done within thirty days from such date, a certificate of good health should be furnished. After the expiration of thirty days, his delinquent

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assessments were paid by his wife to the financier of the subordinate lodge, but no certificate of health was furnished. A minute of the payment and reinstatement was made on the books of the subordinate lodge, and the money forwarded to the proper officer of the general lodge, who refused to receive it, because no certificate of health accompanied it, and returned the same to the subordinate lodge. It was returned to the wife of the member who paid it. The minute upon the books of the reinstatement, etc., was stricken out, and an entry made, that because of the mental illness of the member and his inability to produce a certificate of health, as required by the rules of the grand lodge, his suspension was upheld. The court held that, "as the rules of the grand lodge provided the only method of reinstating a beneficiary certificate after it had been suspended for thirty days, the officer of the subordinate lodge could not waive the requirements; that a subordinate lodge and its officers have no authority to waive any rules of the grand lodge which relate to the substance of a contract between an individual member and the grand lodge." *Modern Woodman of America v. Tevis, supra*, is authority upon this point also.

It appears from the testimony of the financial secretary in this case that, in making payments to the national council he drew his warrant on the treasurer of the local council against the insurance fund. Section 125 of the by-laws provides, that "No money shall be paid or transferred from the treasury of any council (except such moneys as the council is called upon to regularly pay for its current expenses and as provided by the laws of the order, or for purposes approved by the national council or board of directors) unless by a two-thirds vote of the members present and voting at a regular meeting held subsequent to a regular meeting at which notice in writing of a resolution or intention to pay or transfer such money and the purposes and amount to be paid or transferred shall have been given and regularly read;" which would seem to be a sufficiently



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expressed inhibition upon the local council to do the very thing which it did do in this case.

We are of opinion that by his failure to pay his assessments as provided by the constitution and by-laws, William J. Burroughs, *ipso facto*, forfeited his membership in the order of Knights of Columbus; that the subordinate local council, in undertaking to make good the delinquencies of its members, by its warrants drawn by its financial secretary against the insurance fund, without complying with section 125 of the by-laws, acted without authority; that in so acting it was the agent of its members, and not of the national council; and that the national council, having received the money in ignorance of the facts, has not waived the forfeiture, and is not by its conduct, estopped to set it up in defense to this action.

For these reasons, we are of opinion that the instruction set out in bill of exception No. 1, asked for by defendant in error, considered in the light of the facts of this case, is erroneous and should have been refused; and that the instructions asked for by plaintiff in error, set out in bill of exception No. 2, should have been granted. The judgment of the corporation court is, therefore, reversed, and the cause remanded for a new trial, in accordance with the views presented in this opinion.

*Reversed.*

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**Richmond.**

NEWPORT NEWS LIGHT & WATER COMPANY v. PENINSULAR  
PURE WATER Co. (No. 1.)

January 16, 1908.

1. *STATE CORPORATION COMMISSION—Jurisdiction over Public Service Corporations—Public Duties—Private Rights—Injunctions.*—The constitutional provision creating the State Corporation Commission and defining its duties and powers, and the Acts of Assembly passed in pursuance thereof manifest that, so far as public service corporations are concerned, the body was created to procure from them better service for the public, and to that end the Commission was given power and authority over corporations chartered and doing business in this state in the performance and discharge of their *public duties*, but it was not intended to confer upon the Commission jurisdiction to hear and determine cases against such corporations in which the matters in controversy relate primarily to injuries to private property rights, and only affect the public incidentally. The Commission, therefore, has no jurisdiction to enjoin one public service corporation from infringing upon the private rights of another such corporation in which the public is only incidentally interested.

Appeal from State Corporation Commission.

*Affirmed.*

The opinion states the case.

*R. G. Bickford and Batchelor & Phillips*, for the appellant.

*S. Gordon Cumming*, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

The only question involved in this case is whether or not

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the State Corporation Commission has jurisdiction to enjoin and restrain the appellee from doing the acts complained of by the appellant in its petition for an injunction.

Both appellant and appellee are public service corporations, engaged in the business of supplying water to the towns of Hampton and Phoebus, among other places. The alleged wrongful acts sought to be enjoined are:

(1st) That appellee, without authority, and in violation of the statute law of the state relating to corporations, is proceeding to occupy with a system of water mains and pipes the same streets already occupied by the appellant in the said towns;

(2nd) That the appellee has laid and is proceeding to lay its pipes at a less distance from the outside of the pipes of the appellant, when paralleling and crossing the same, than is permitted by section 2, ch. IX, of the act concerning public service corporations, approved January 18, 1904, Acts 1902-3-4, pp. 968-1003 (Code, 1904, sec. 1294i. cl. 2.);

(3rd) That the appellee has violated sec. 3, ch. II, of the same act, which requires that one public service corporation, before crossing with its works the works of another such corporation, shall give notice of its purpose, accompanied by plans and specifications, by failing to give such notice;

(4th) That the appellee has violated sec. 17, ch. II, of the same act, which requires that public service corporations shall conform to the "act concerning corporations," which went into effect May 21, 1903, in this, that it has failed to proceed under section 6, ch. III, of the last-named act to have its charter amended so as to acquire the right of eminent domain; and that, having no such power, it has no right to cross the pipe line of the appellant without its consent;

(5th) That by virtue of those alleged wrongful acts, the improper and careless manner in which the appellee is doing the work complained of, and the insolvency of that company, the

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appellant will suffer irreparable injury unless the appellee is restrained from doing the acts complained of.

The Corporation Commission declined to grant the injunction, being of opinion that it had no jurisdiction to grant the relief prayed for upon the case made.

Section 19, ch. 2, of the act concerning public corporations (Code, 1904, sec. 1294b, cl. 19) is relied on by appellant as giving the commission jurisdiction. That clause is as follows: "Any person or corporation aggrieved by anything done or omitted in violation of the provisions of this act, by any public service corporation chartered or doing business in this state, shall have the right to make complaint of the grievance and seek relief against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the State Corporation Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this act, and the said commission, sitting as a court of record, shall also have jurisdiction, by mandamus, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this commonwealth, subject as to any matter arising under this section to the right of appeal to the Supreme Court of Appeals by either party as of right in the mode prescribed by law, but nothing in this section shall be construed to confer any power upon the State Corporation Commission which is forbidden to the courts by section twelve of chapter four of this act."

The provision quoted is broad enough, standing alone, to give the Commission jurisdiction to grant relief for any violation of any of the provisions of the "Act Concerning Public Service Corporations," by any such corporation chartered or doing business in the state; but when read, as it must be, in connection

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with the constitutional and statutory provisions defining the powers and duties of the Corporation Commission (Const., sec. 156, par. "a," "b," and "c;" Act of Assembly, approved April 15, 1903, ch. 147, sec. 16, sec. 1313a, cl. 16, code, 1904), we do not think that the Commission erred in holding that it did not have jurisdiction to grant the relief prayed for in this case.

The constitutional provision defining the powers and duties of the Commission, and the act of April 15, 1903, enacted to put into effective operation the provisions of the constitution, were intended, as we understand them, to give power and authority to the Commission over corporations chartered or doing business in this state, in the performance and discharge of their *public duties*, and were not intended to confer upon the commission jurisdiction to hear and determine cases against such corporations, in which the matters in controversy relate primarily to injuries to private property rights and only affect the public incidentally.

By section 156c of the constitution, it is provided, that "In all matters pertaining to the *public* visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, \* \* \*" and by section 16 of the act of April 15, 1903, it is provided that, "the Commission shall have power and authority to require, by its rules, regulations and requirements, all corporations chartered under the laws of this state and all foreign corporations doing business in this state, to perform and discharge any *public duty* or *requirement* imposed upon such corporation by the constitution or by law, and \* \* \* the Commission may enforce against any such corporation, by its judgments and processes, any fine or penalty imposed by law for the failure of any such corporation to perform any *public duty* required of it, or to comply with any requirement of law or any lawful regulation of the commission in reference to the same."

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The acts of the appellee sought to be enjoined affect primarily the property rights of the appellant, and only incidentally affect the public. If the construction contended for by the appellant be placed upon section 19, ch. II, of the act concerning public corporations, viz.: that the Corporation Commission has jurisdiction to grant an injunction for any and every violation of any of the provisions of that act, then it will have jurisdiction over a great number and variety of controversies in which the public has no interest, or if any only incidentally, such as every failure of such corporations to make compensation to any person damaged by its use of the streets or alleys of any city or town (as provided by sec. 1, ch. II, of the act); or, where its works pass through the land of another, for failing to provide suitable wagon ways across the same (as provided by sec. 2 of the same chapter); or where a telephone or telegraph company is stringing its wires across the property or premises of any person, without first having obtained his consent (as provided by sec. 1, ch. 8, of the act); or where it fails to make compensation to any person damaged in his property along the line of a public road or street before using or occupying the same with its works (as required by sec. 5 of the same chapter.)

A construction which would clothe the Corporation Commission (a body created, as it manifestly was, to procure from public service corporations better service for the public, and to that end having the powers and authority of a court of record), with jurisdiction over such a class of cases—over matters in which the public has no interest, or is only interested incidentally—ought not to be given, unless it be clear that the legislature so intended. Such an intention not being clearly manifest, when all the constitutional and statutory provisions on the subject are considered, we are of opinion that the Corporation Commission had no jurisdiction of the case made, and that its order must be affirmed.

*Affirmed.*

Opinton.

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**Richmond. .**

NEWPORT NEWS LIGHT & WATER COMPANY v. PENINSULAR  
PURE WATER Co. (No. 2.)

January 16, 1908.

This case is controlled by *Newport News Light & Water Co.*  
v. *Peninsular Pure Water Co.*, (No. 1), ante p. 695.

Appeal from State Corporation Commission.

*Affirmed.*

*R. G. Bickford* and *Batchelor & Phillips*, for the appellant.

*S. Gordon Cumming*, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

This case was argued with the case of *Newport News Light and Water Co. v. Peninsular Pure Water Co.*, No. 1. As the question involved in both cases is the same, the order appealed from in this case is affirmed, for the reasons stated in the opinion of the court in the other cause, and this day filed.

*Affirmed.*

Syllabus.

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**Richmond.**

ROCHESTER GERMAN INSURANCE COMPANY v. MONUMENTAL  
SAVINGS ASSOCIATION.

January 16, 1908.

Absent, Harrison, J.

1. **PLEADING—Fire Insurance Policy—Non-Assumpsit.**—In an action of assumpsit on a fire insurance policy, the defendant may, under the plea of *non-assumpsit*, show a breach of conditions of the policy avoiding it if the interest of the assured was other than “unconditional and sole ownership,” or if “any change in interest, title or possession” took place without notice to the insurer.
2. **FIRE INSURANCE—Sole Ownership of Property—Options—Conditional Sales—Enforceable Contracts.**—Although an insurer of property may have given an option upon it, or made a conditional sale of it, if he cannot specifically enforce his option or contract, he is still the “unconditional and sole owner” of the property, and the risk of loss by fire is his.
3. **FIRE INSURANCE—Unconditional and Sole Ownership—Burden of Proof.**—The burden is upon the insurer to show that when a policy was issued, the insured was not the unconditional and sole owner of the property insured, if that fact be in issue.
4. **DEMURRER TO EVIDENCE—Necessary Inferences.**—Where the only evidence that the insured was not, at the date of the policy, the unconditional and sole owner of the property insured consists of parol evidence offered by the insurer as to a written agreement, neither the date nor terms of which are shown, and the insurer demurs to the evidence, it is not a *necessary* inference that the agreement was in existence when the policy was issued and that the insured could specifically enforce it, and hence these facts will not be inferred.
5. **EVIDENCE—Non-Production of Writing—Presumption—Excuses.**—Where it develops during the trial of an action at law that there is in the possession of the plaintiff a written contract affecting his right to recover in the action, no presumption will be indulged



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against him on account of his non-production of the paper where it appears that he was not called upon to produce it, had no notice of any defense which would render the contract material, and, where it does not appear that it was within his power to produce it during the trial. This is especially true on a demurrer to the evidence by the defendant.

Error to a judgment of the Circuit Court of Norfolk county in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

*N. T. Green*, for the plaintiff in error.

*H. G. Avery and Gordon Paxton*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action of assumpsit upon a fire insurance policy. The policy contains the following clauses:

"The entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership."

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if any change other than by death of an insured takes place in the interest, title or possession of the subject of the insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise."

Under the decisions of this court in *Westchester Ins. Co. v. Ocean View &c. Co.*, 106 Va. 663, 56 S. E. 584, 1 Va. App. 61, and *Va. Fire &c. Co. v. Cace &c. Co.*, ante p. 588, 59 S. E. 369, 1 Va. App. 546, decided at the November term, 1907, it was conceded that the insurer was not liable if either of these clauses had been violated by the insured. Neither of these grounds of

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defense were specially pleaded, but were made, as was permissible, under the general issue.

During the progress of the trial, it was incidentally mentioned by one of the witnesses of the insured that a man named Williams had some kind of an agreement with the insured for the purchase of the property covered by the policy. Thereupon, the counsel of the insurer, after stating that he had never heard of such an agreement before, proceeded to examine, as his own, two witnesses introduced by the insured as to the existence, date and character of the agreement. While their evidence shows that there was some kind of an agreement or contract in writing between the insured and Williams, it does not appear when it was entered into, or what were its terms. The writing, which the evidence tended to show was at the home office of the insured in Baltimore, Maryland, was not called for by the insurer. Williams was in possession of the property when the fire occurred, but it is conceded that it does not appear when he took possession, or when the contract was made. The evidence shows that the three houses insured were worth about three hundred and fifty dollars each, or \$1,050, and they were insured for \$600. One of the witnesses stated that Williams was purchasing the property on the contract plan (what that is he does not explain), and was paying five dollars per month as installments or dues—he was not certain which, but thought they were dues; but he had never seen and did not know the terms of the agreement. The other witness, who had seen it, said that it was “what we term an agreement of sale, and I think the agreement stipulates that after he makes a certain number of payments, they would give him a deed. He was to make monthly payments at a stipulated price for the property.” But the witness neither states what the stipulated price was, the amount of the monthly payments, nor how many were to be made before the insured would be entitled to a deed. The evidence does not show that the agreement was one which bound Williams to take the property

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and pay for it, and which the insured had the right to have specifically enforced, or whether it was an option, or conditional sale, which only bound Williams in the event he elected to be bound.

If the agreement between the insured and Williams was an option, or conditional sale, which did not bind Williams to keep and pay for the property, then the insured was the "unconditional and sole owner" of the property within the meaning of that term.

What is meant by that language was considered and passed upon in the case of *Manhattan Fire &c. Co. v. Weill &c.*, 28 Gratt. 389. At page 398 it is said: "This condition does not refer to the legal title, but to the interest of the assured in the property; that he warranted to be no 'other than the entire unconditional and sole ownership of the property.' This was no warranty against liens and incumbrances. His interest was the sole ownership. The fact that he had mortgaged the premises did not make the mortgagee a joint owner with him. The fact that he may have incumbered it with a deed of trust does not make the *cestui que trust* a joint owner. The fact that there may have been liens for taxes, or liens by judgment, did not affect his ownership. He is still sole owner, though he may have encumbered it, or liens may exist against it, and the existence of such is no breach of a condition declaring sole ownership. This is the doctrine of the courts settled by repeated decisions." See also *Woody v. Old Dominion &c.*, 31 Gratt, 362, 31 Am. Rep. 732; *Morotock Ins. Co. v. Rodefer Bros.*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

And for like reasons, the insured will be construed to be the unconditional and sole owner, although he may have given an option, or made a conditional sale, which he cannot specifically enforce, and where the risk of loss by fire continues to be his.

In the *Phoenix Ins. Co. v. Kerr*, (U. S. Cir. Ct. of App. 8th Cir.) 129 Fed. 723, 66 L. R. A. 569, the evidence was that the

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insured bought, paid \$6,000, and took title to an elevator. Thereupon, he made a written agreement with other persons to the effect that they should have the possession and use of the property for a monthly rental of \$100, and for the payment of the premium on the insurance; that they should be at liberty to pay more than \$100 per month, if they saw fit; that if they failed to pay as much as that for two months, the contract should cease, and the insured should retain the moneys he had received; but that if they should continue to make the payments until they should aggregate \$6,000 and interest at ten *per cent.*, the insured would convey the elevator to them. When the loss occurred they were not in default. They had paid about \$1,200 under that contract, and were in possession of the property. Upon that state of facts the court held that the insured was the sole and unconditional owner of the property, because the parties holding the option were not bound to take or pay for the property and could not be compelled to do so, and the loss by fire would fall upon the insured. See also Cooley's Briefs on the Law of Insurance, Vol. 2, p. 1369, and cases cited.

The burden was upon the insurer to show that when the policy was issued the insured was not the unconditional and sole owner of the property. The insurer demurred to the evidence. By so doing, although there was no evidence as to the agreement in question, except that introduced by itself, it waived all inferences which did not *necessarily* result therefrom. 4 Min. Insts. 831, and cases cited. *Tutt v. Slaughter*, 5 Gratt. 364, Michie's Ed. p. 449, where the cases are cited.

It cannot be said, upon the evidence as to the agreement in which neither the date nor the terms of it are shown, that the necessary inference is that it was in existence when the policy was issued, and that it was such a contract for the sale of the property as could be specifically enforced by the accused against Williams.

Under the facts of this case, the non-production of the

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written agreement by the insured afforded no presumption—certainly not on a demurrer to evidence—against the insured. The insured was not called upon to produce it; had no notice that any defense would be made which would make the writing material; and, being in another state, it does not appear that it was within its power to produce it during the trial.

Neither does the evidence show that any change took place in the interest, title or possession of the subject of insurance, after the policy was issued. The only change relied on is that which resulted from the agreement of the insured with Williams. It is conceded that it was not shown (and if it were not, it does not appear) when Williams took possession of the property, or when the agreement with him was made.

The other grounds of error assigned in the petition need not be specially considered, as they do not seem to be much relied on, and, if they were, are without merit.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.**

SCHERMERHORN'S EXECUTRIX v. COMMONWEALTH & ANOTHER.

January 16, 1908.

1. **APPEAL AND ERROR—Amount in Controversy—Taxes.**—A tax is nothing more than a debt due by the citizen to the taxing power, and unless the right to impose the tax or the construction of the statute under which it is imposed is called in question, or necessarily passed upon in the trial court, no appeal lies to this court from the judgment of the trial court imposing a tax, if the aggregate amount of the tax imposed is less than three hundred dollars.

Error to a judgment of the Circuit Court of Elizabeth City county, on an application to correct an erroneous assessment of taxes. Application refused.

*Dismissed.*

The opinion states the case.

*Jones & Woodward*, for the plaintiff in error.

*Attorney-General Wm. A. Anderson* and *B. A. Lewis*, for the defendants in error.

CARDWELL, J., delivered the opinion of the court.

The writ of error in this case was allowed to a judgment of the circuit court of Elizabeth City county, dismissing an application of the plaintiff in error to correct an alleged erroneous assessment of taxes on personal property.

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Plaintiff in error's testator was a resident of Elizabeth City county, and died possessed of property, real and personal, aggregating in value the sum of \$38,500. Of that amount the sums of \$1,000, \$12,000 and \$3,000 were the value of realty, the residue being personal property, consisting of household furniture valued at \$1,000, Kecoughtan Dry Goods Co., \$10,000, an undivided one-fourth interest in the Powhatan Oyster Co., \$10,000, and a chose in action, \$1,500.

The examiner of records for the judicial circuit including Elizabeth City county, finding recorded in the county clerk's office the appraisal of the estate of plaintiff in error's testator, communicated with plaintiff in error several times through the mail, but received no answer from her as to the cash value of the personal property and income subject to taxation, held by her on February 1, 1906, in her capacity as executrix. He did receive, however, from her counsel information as to what personalty the executrix held which was liable to taxation, as follows:

"Your postal about Capt. Geo. Schermerhorn's estate is rec'd. Mrs. S., the executrix, is out of town and has been for some time. I have taken up the matter, however, and report that on the 1st of February, 1906, the estate of Geo. Schermerhorn was worth \$14,500. The whole appraisal, including real estate, was \$38,500. The personal estate was appraised at \$22,500. But the Kecoughtan Dry Goods Co. had been closed out at a heavy loss, and, in fact, on the 1st of February, 1906, there was not on hand more than \$2,000. So that \$14,500 was the full value of the personal estate 1st February, 1906."

Upon the receipt of this communication, the examiner of records reported to the commissioner of the revenue for the county of Elizabeth City that the estate of plaintiff in error's testator was assessable for state and county taxes on \$14,500, the value of the personal property as of February 1, 1906, and accordingly the commissioner of the revenue assessed this per-

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sonal property for state and county purposes on his books for the ensuing tax year; whereupon this proceeding was instituted for the purpose of correcting the assessment, upon the ground that the estate was not liable for such taxes on the property known as the Kecoughtan Dry Goods Co., or the interest of testator in the Powhatan Oyster Co., because the interest in the dry goods business was not assessable with state taxes under the revenue laws of the state, nor the interest in the Powhatan Oyster Co. liable for the tax assessed, but taxable only under what is known as the oyster laws. In other words, the contention is that the taxes complained of were erroneously assessed, or that it was in effect double taxation. But, confessedly, the amount of the taxes assessed and sought to be corrected did not aggregate the sum of \$300, which is the jurisdictional limit of this court.

Plaintiff in error simply claims that the assessment of the interest of the testator in the Kecoughtan Dry Goods Co. and in the Powhatan Oyster Co. for state or county taxation is erroneous or excessive. This appears from the notice itself by which this proceeding was instituted, in which the only ground relied upon by plaintiff in error for a correction of the assessment, or for relief from the payment of the taxes is that the estate of her testator is assessed for taxation with \$14,500 of personal property, whereas it should only be assessed with \$2,500.

Unless the right to impose the tax, or the construction of the statute under which it is imposed, was called in question, or necessarily passed upon by the court below, it would seem clear that this court is without jurisdiction, as the aggregate amount of the taxes and levies involved is less than \$300. *Hulvey v. Roberts*, 106 Va. 185, 55 S. E. 585.

The provision of the constitution limiting the jurisdiction of this court in civil cases is as follows:

"The court shall not have jurisdiction in civil cases where



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the matter in controversy, exclusive of costs and interest, accrued since the judgment of the court below, is less in value or amount than \$300, except in controversies concerning \* \* \* the right of the state, county or municipal corporation to levy tolls or taxes, involving the construction of any statute, ordinance or county proceedings imposing taxes."

It has been repeatedly held by this court that a tax is nothing more than a debt due by the citizen to the taxing power, for which an action of debt will lie to recover it.

The constitutional provision conferring jurisdiction upon this court is in no essential particular different from the one in force when the case of *Neal v. Com'th*, 21 Gratt. 511, was decided, where it was held that the right to levy tolls or taxes is a prerequisite to the jurisdiction of this court. In that case Neal was assessed with a double tax for failure to take out a license as a commission merchant, and he applied to the corporation court of Danville to be relieved from the tax, on the ground that he was not bound to take out such license. The amount of the tax was less than the jurisdictional limit of this court (\$500), and the lower court refused to relieve Neal from the tax. On appeal, this court held that the appeal did not lie and dismissed it, because the amount in controversy was less than \$500. In the opinion by Moncure, P., after deciding that it was a civil and not a criminal case, he quoted from the constitution and held that the case did not come within any of the exceptions named in the provision, declaring in effect that it was too plain for argument that the constitutional provision "concerning the right of a corporation or of a county to levy tolls or taxes" does not confer jurisdiction in such cases, and dismissed the appeal.

We are unable to see that that case is different in its material facts, as is contended by plaintiff in error, from the case at bar. Nor are we able to appreciate the force of the contention of counsel that this case is controlled by that of *Prince George*

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*County v. A. M. & O. R. Co.*, 87 Va. 283, 12 S. E. 667, for the plain reason that in the latter case the right of the county to levy the tax in question was directly involved and decided in the lower court.

The question as to the uniformity of the tax, as required by section 168 of the constitution, is in no way involved, as the tax from which relief is prayed was levied and is to be collected under the general revenue laws of the state.

In *Florance v. Morien*, 98 Va. 26, 34 S. E. 890, it was held that the right to subject land to a lien thereon for taxes is not a controversy concerning the title to the land, and if the decree for such taxes amounts to less than \$500, no appeal can be had therefrom to this court, as the controversy was over the amount of the tax levied and not the right to subject the land to the lien thereof.

In *Miller v. Navigation Co.*, 32 W. Va. 46, 9 S. E. 57, the navigation company was authorized by its charter to levy tolls upon persons using a river which had been improved by it. An action of assumpsit was instituted by the company against Miller for tolls alleged to be due from him for the use of the river, and judgment was entered in favor of the navigation company for \$66.00, which was less than the amount necessary to confer jurisdiction upon the supreme court. Upon a hearing of the writ of error awarded to the judgment, it was held that the supreme court had no jurisdiction to review the judgment of the circuit court, although the record showed that the real defense to the action was that the condition of the river was such that the plaintiff had no right to levy the tolls for which the judgment was recovered.

In this case, as has been remarked, the notice of motion to have corrected the assessment and levy of the tax in question does not, nor does any other pleading in the cause, put in issue the right of the state or county to make the assessment or levy, nor was that question necessarily involved and passed upon at

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the hearing, when the judgment complained of was rendered. Therefore, this court is without jurisdiction to review the judgment, and the writ of error awarded thereto must be dismissed as improvidently awarded.

*Writ dismissed.*

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Syllabus.

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**Richmond.**

## SHOWALTER'S EXECUTORS v. SHOWALTER AND OTHERS.

January 16, 1908.

1. **ELECTION BY WIDOW—Devise of Wife's Land—Dower—Code, Sec. 2271.**  
—Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases. The provisions of Sec. 2271 of the Code have no application to such a case.
2. **ELECTION OF WIDOW—How Made—Evidence of Election—Case in Judgment.**—The election of a widow to accept the provisions of her husband's will in lieu of what she would otherwise be entitled to according to law may be made in express terms, or may be implied from acts and conduct, but in either event it must have been with knowledge of her rights and with the intention of election. To raise an inference of election from her conduct, where the rights of others have not been affected, it must appear that she knew of her right of election, and clear proof must be furnished of a choice on her part to accept the provision made by the will and to reject what she would otherwise be entitled to. Ambiguous acts and conduct will not, in general, be construed as an election. In the case in judgment every act relied upon as election by the widow was performed by her at the instance of her sons, who were the executors of her husband's will, and within less than a month after his death, and were of such an equivocal nature as not to amount to an election. During the two months which elapsed between her husband's death and the date of the renunciation of his will she remained in the mansion house occupied by him at the time of his death and which was devised to her for life, but this she had a right to do as widow until dower was assigned, and her selection and acceptance of a cow and two hogs and her continued possession of other personal property might well have been referred to

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the assertion upon her part of her statutory rights as widow. The deed of renunciation is ample for that purpose, and no one is placed in any worse position by the renunciation than he would have been had the renunciation been made on the day of her husband's death.

3. EQUITY. PRACTICE—*Suppression of Depositions taken after Case Submitted.*—The suppression of the depositions of the complainants in this cause, taken after the case had been argued and submitted, was not error under the circumstances of this case. The cause had been pending for some time, and they had already testified more than once.
4. EXECUTORS AND ADMINISTRATORS—*Payments to Distributees.*—Under the circumstances of this case, and there being no evidence of unsatisfied debts against the estate of the testator, nor of costs and charges superior in right to the widow's claim as a distributee, it was not error to decree to her out of the fund in hand the immediate payment of a large part of the sum to which she was entitled as a distributee of her husband's estate.

Appeal from a decree of the Circuit Court of Augusta county. Decree in favor of defendant, Elizabeth R. Showalter. Complainants appeal.

*Affirmed.*

The following is a copy of the deed of renunciation referred to in the opinion of the court:

“Know all men by these presents, that whereas Henry A. Showalter, of Augusta county, Virginia, departed this life on the 1st day of October, 1905, seized and possessed of a considerable real and personal estate; and whereas the said Henry A. Showalter in his lifetime made his last will and testament with codicils thereto according to law which has been probated before the clerk of the circuit court of said county and recorded in the clerk's office of Augusta county in Will Book No. 60, pages 7, 8, 9, etc., which will contained the following clauses, to-wit:

“1st. I devise unto my wife, Elizabeth R. Showalter, should

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she survive me, the tract of land situated at Weyer's Cave, containing 19 acres, 2 roods and 20 poles, with all the improvements thereon for the term of her natural life, or so long as she remains my widow. After her death, to be sold and conveyed by my executors as my other lands are hereinafter directed to be sold; and the proceeds of said sale to be divided as the proceeds of my other property.'

"'2nd. I give to my said wife, Elizabeth R. Showalter, should she survive me, all of my household and kitchen furniture, including washing machine, tubs, kettles, buckets, &c., garden tools, one buggy and harness, a good and gentle horse, a cow and two hogs, and I direct my executors hereinafter named, to pay to my said wife, one hundred dollars (\$100.00) out of the first moneys coming into their hands, provided she has not that much money in hands, and to set apart the sum of two thousand dollars (\$2,000.00) out of my estate, the net proceeds of which sum shall be paid to her annually during her life, for her support, the principal, upon her death to revert to my estate and be distributed as a part thereof under the subsequent provisions of this my last will.'

"And whereas, I, Elizabeth R. Showalter, widow of Henry A. Showalter, deceased, am the devisee and legatee mentioned in the said clauses and provisions of the said will and desire to waive and renounce the same:

"Now, therefore, I, Elizabeth R. Showalter, widow of said Henry A. Showalter, deceased, and of Augusta county, do hereby waive and renounce the said clauses and provisions of the said will of Henry A. Showalter, deceased, and elect to claim such share of my said husband's estate, real, personal and mixed as I would have had if he had died intestate.

"Witness my hand and seal this the 8th day of December, in the year 1905.

"ELIZABETH R. SHOWALTER. (Seal.)"

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*Bumgardner & Bumgardner* and *Sipe & Harris*, for the appellants.

*Quarles & Pilson*, for the appellee.

KEITH, P., delivered the opinion of the court.

The executors of Henry A. Showalter filed their bill in the circuit court of Augusta county, in which they show that their testator departed this life on the 1st day of October, 1905, having first made his last will and testament, bearing date on the 15th day of May, 1903, with various codicils thereto attached; that his will was admitted to probate, and his executors qualified, on the 7th day of that month; that by the first and second clauses of said will certain provisions were made for Elizabeth R. Showalter, his widow, and after full conference with her, and under her direction, they set apart and delivered to her the property specifically bequeathed, and placed her in possession of the homestead and nineteen acres of land devised to her for life; that in taking and receiving the chattels given to her by the first and second clauses of the will, the widow claimed that she was entitled to choose and select the cow and two hogs, and the stock so selected were set apart and were neither appraised nor sold by the executors; that the executors were directed by the will to pay to the widow the sum of \$100 out of the first money that should come into their hands, and that they, having received the cash from the purchaser of the property sold by them, pointed out to and read to the widow the first and second clauses of the will and offered to her the sum of \$100, given to her by the said will, and she being fully acquainted with the provisions of the will, and that the executors were offering and proposing to pay to her the said sum of money because it was given to her by said will, formally receipted to the executors for that sum; and it is claimed that by

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that acceptance she deliberately and conclusively elected to accept the provisions of the will in her favor.

It is further alleged in the bill, that some time in the month of May, 1903, the testator, desiring to make sale of a valuable tract of land in Augusta county, and in connection therewith to make final testamentary disposition of his property, took these matters under consideration with his wife, who called in friends to advise with her; and that, acting with full knowledge and advice, the sale of the farm was made, and the will, bearing date on the 15th day of May, 1903, was agreed upon and executed; and that so well understood was the contract made and entered into at that time between the testator and his wife, that a copy of the said will was made by one of the parties with whom she was consulting as her adviser, and under her directions placed in his hands. The complainants charge that thereupon the testator in conjunction with his wife made and executed a coveyance of the land; that, without such agreement and acceptance of the provisions of the will, the real estate would not have been converted into personalty by the testator, and other provisions of the will in favor of other legatees would not have been made, it being distinctly understood and agreed between the testator and his wife, that she would accept the provisions for her benefit if her husband would make certain devises and bequests in favor of her daughters, Mary C. and Hettie E. Showalter; that, relying upon this understanding and agreement, the testator sold the farm, received the sum of \$8,000 in cash, subsequently collected a considerable portion of the purchase money, and proceeded to advance these sums to his several children, but not always in equal amounts, in accordance with the general plan as shown by his said will; none of which things would have been done but for the contract and agreement between himself and his wife.

It further appears from the bill that on the 8th day of December, 1905, the widow made and executed a paper writing,



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filed as an exhibit with the bill, purporting to be a renunciation of the provisions made for her by her husband's will. The bill charges that this renunciation of the provisions of the will was procured from the widow through the undue influence of certain of her children, exerted upon her to such an extent as to destroy her free agency and to coerce her into an attempt to violate the contract made and entered into between her and her husband.

Other matters contained in the bill are not pertinent to the issues now to be considered. It concludes with the prayer that the court will decree that the widow is estopped or precluded by the agreement hereinbefore stated from renouncing the provisions of the will and claiming her dower in the real estate and her distributive share in the personal estate, and that she, by her own acts before recited, be held to have elected to accept the provisions of the will made in her favor; and that the court will adjudge and declare specifically how the estate of the testator shall be distributed, under all of the circumstances of the case.

The widow filed her answer, in which she denies that the property given to her by the will was set apart to her by the executors after a full conference with her—that the personal property bequeathed to her was left upon the premises by the executors, where she resided and where it was at the time of the death of her husband, and was not sold by them; but she denies that she gave any direction as to setting aside the personal property, except that she indicated to the executors the cow and the two hogs she preferred when requested by them to make the selection. She denies that she was put into possession of the nineteen-acre tract of land by complainants; but says that she was residing on the land at the time of her husband's death, and has simply continued to reside there from that date; that the 19-acre tract consists of three small adjoining parcels, one of 3 acres and 19 poles, which was conveyed to her husband and herself by deed dated October 1, 1900, for the sum of \$3,000; that the mansion house and other improvements are located on

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this tract; and that she was residing at the time of her husband's death upon this tract, and has ever since resided there. She denies that the will was read at the time the sum of \$100 was paid to her, but her account of this transaction is that the executors, soon after they qualified as such, and not long after the death of her husband, came to her home while she was in the deepest grief and sorrow over the death of her husband, and proposed to pay her the \$100, and urged her to receipt for this sum in a hurry, saying that the receipt was simply intended to show that she had received the money, and assigning as a reason for their haste that they wished to return to their homes.

Upon these issues, a great amount of testimony was taken, and we agree with the circuit court, that with respect to the alleged contract under which it is claimed the will was made, the preponderance of evidence is clearly with the widow, and does not sustain the contention that there was an agreement by which the widow bound herself to abide by the provisions of the will, or justify the charge that she has acted in bad faith.

Nor do we think that the doctrine of election applies to her undivided interest in the three acres and nineteen poles tract, which had been conveyed to her husband and to her, jointly.

In *Pence v. Life*, 104 Va. 518, 52 S. E. 257, Judge Buchanan, discussing the provisions of section 2271 of the code, said: "The provisions of the statute have no application, as we understand them, to a case like that we are now considering. They were intended to provide how a widow must proceed who desires to reject the provisions made for her by her husband's will and of property other than her own, and to take such interest in his lands as the law gives her. Where a testator disposes of property belonging to his wife, in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases." Citing a number of authorities.

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There can be no doubt that Mrs. Showalter's undivided one-half interest in the 3 acres and 19 poles tract continued to be her property after the renunciation of the will.

This brings us to the consideration of the remaining and principal ground of contention in this case: Did the widow irrevocably elect by her acts and conduct to accept the provisions of her husband's will, so as to preclude her from the exercise of the right of renunciation?

In *Pomeroy Eq. Jur.* sec. 515, it is said: "To raise an inference of election from the party's conduct merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right; and that he had full knowledge of all the facts concerning the parties. As an election is necessarily a definite choice of the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must be done with an intention to elect, and must show such intention."

In 1 *Jarman on Wills* 435 (m. p.), it is said: "In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect to them, etc.; and a person having elected under a misconception is entitled to make a fresh election."

2 *Min. Inst.* (4th ed.) at p. 1006, is as follows: "It is well established that no one shall be constrained to make an election until the interests to which the election relates are clearly defined, and their relative values ascertained; and an election made before that is done, will, for the most part, be disregarded, at least if it be made under mistaken impressions as to the facts; but only upon the terms (supposing the election to have been unambiguously made) of restoring other persons, whose rights are affected by the party's act of election, to the same situation substantially as if that act had not taken place." And at page 1008 the same author says: "Clear proof of an election made

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must be furnished, and ambiguous acts and conduct will in general not be so construed, unless in those cases where the interests of others have been affected by the acts and require that they should be interpreted to amount to an election. \* \* \* The proof of an election made may be either express, in terms, or it may be, and most frequently is, implied from acts and conduct, such as acceptance and acquiescence; but in either case it must have been with knowledge of the party's rights and with the intention of election." *Taylor v. Browne*, 2 Leigh 417; *Upshaw v. Upshaw*, 2 Hen. & Munf. 381, 3 Am. Dec. 632; *Hill v. Houston*, 15 Gratt. 357; *Penn v. Guggenheimer*, 76 Va. 850.

The testator died on the 1st of October, 1905; his will was admitted to probate on the 7th day of October, 1905; and the executors qualified on the same date. On the 8th of December, 1905, the widow executed a paper, which is filed as "Exhibit R" with the bill, in which, after reciting the death of her husband, the probate of his will, and the provisions made for her in it, she says: "Now, therefore, I, Elizabeth R. Showalter, widow of said Henry A. Showalter, deceased, and of Augusta county, do hereby waive and renounce the said clauses and provisions of the said will of Henry A. Showalter, deceased, and elect to claim such share of my said husband's estate, real, personal and mixed as I would have had if he had died intestate. Witness my hand and seal this, the 8th day of December, in the year 1905." Her signature to this paper was acknowledged before a notary public on the 8th day of December, 1905, and was on the same day admitted to record in the clerk's office of the circuit court of Augusta county.

The acts which are relied upon as showing an intelligent election to accept the provisions of the will and to estop the widow from exercising the right of renunciation are: (1) That she was put into possession of the tract of land at Weyer's Cave, which, together with its improvements, was given to her during

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her life. A sufficient answer to this is, that she was living on this tract with her husband at the time of his death, and continued to reside there, as she had a right to do under the law until dower was assigned to her.

The selection and acceptance of the cow and two hogs, and the continued possession of other personal property named in the will are equivocal acts which may with propriety be referred to the assertion upon her part of her statutory rights as widow, and do not necessarily imply that she knew of her right of election, and that she made it with a full knowledge of all the facts necessary to its intelligent exercise. Every act relied upon by the executors to estop their aged mother from the exercise of the right of renunciation was performed by her at their instance and request within less than a month after the death of her husband.

In *Dixon v. McCue*, 14 Gratt. 561, Judge Daniel, speaking of a widow's renunciation, says: "I do not think she has done anything which deprives her of the right to make her election now. Her retaining possession of the farm after her husband's death, does not of itself furnish conclusive evidence of her having elected to accept the provisions made for her by the will. Her possession down to the period of the advertisement of the farm for sale by the executor was, unexplained, conduct of an equivocal character, susceptible of reference, either to her rights as widow of the testator, or to rights conferred upon her by the will. No state of things has grown out of her action in the matter, to disturb which now would work wrong or injury to others. It is true, that in her bill she discloses the fact that in retaining possession she had been acting under her husband's will, but under her husband's will as she construed and understood it. She states in the bill that had she not conceived herself entitled under the will to retain the farm to enable her to raise the children, she would have renounced the will, and claimed that share of her husband's estate to which she would have been

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entitled by law. It is true, we have already expressed our concurrence with the judge of the circuit court in the opinion that the construction of the will for which she contends is not the true one. But we have no reason for supposing that she did not in fact interpret the will as she says she did; or that she did not in good faith shape her conduct by such interpretation. I think we shall act in thorough accordance with the decisions on the subject in holding that the widow has not yet made an irrevocable election."

That case was far stronger against the widow than the one under consideration. Not only are the acts relied upon here to estop the widow equivocal in their nature; but they do not in any degree place any party to the controversy in any worse position than they would have occupied had the widow renounced the will at the instant of her husband's death.

In the petition for the appeal it is assigned as error, that after the case had been argued and submitted, the depositions of John A. Showalter and Jacob A. Showalter were taken, over the protests of the defendants, and sent to the judge of the circuit court, who refused to consider them.

These men were executors of the estate. They had filed the bill. They were perfectly familiar with every detail connected with the case; and they had already testified more than once. It is inconceivable that there was any fact within their knowledge which they had not had ample opportunity to bring before the court. Under such circumstances, we cannot say that the circuit court erred in suppressing their depositions. But, if this were so, it would be harmless error, as the depositions show nothing which should have influenced the decision of the cause.

We are of opinion, therefore, that the widow was within her rights in renouncing the will, and that the paper marked "Exhibit R" was a sufficient evidence of election and renunciation under section 2271 and 2559 of the code, and entitled her to demand dower in the real estate of her husband and such dis-

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tributive share of his personal estate as she would have had, had he died intestate.

The fourth assignment of error is because the executors were directed forthwith to pay to the widow the sum of \$5,233.33. It is claimed that this order of disbursement is premature, considering the condition of the case; that assuming the renunciation of the widow to be valid, the condition of the administration of the estate had not reached the stage under which the court could direct the disbursement of so large a sum to the widow on her distributive share.

It does not appear that at the date of the decree any debts of the estate remained unsatisfied, or that there were any costs and charges superior in right to the widow's claim as a distributee, which rendered the payment to her improper.

We are of opinion that the decree of the circuit court should be affirmed; and that the cause be remanded to be further proceeded in to a final decree.

*Affirmed.*

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**Richmond.**

SMITH'S ADMINISTRATOR v. NORFOLK & WESTERN RAILWAY CO.

January 16, 1908.

Absent, Keith, P.

1. **RAILROADS—Grade-Crossing—Duty of Traveller.**—It is the duty of a traveller about to cross a railroad at grade to approach the crossing carefully, and to look and listen for approaching trains in both directions from which trains may come. Not only so, but his looking and listening should be done at a time and place to render them reasonably effective. If he fails to do so and is injured by a passing train he cannot recover of the railroad company, although its servants have negligently failed to give the crossing signal required by law, unless its negligence is the sole proximate cause of his injury. The vigilance of the traveller to escape injury is commensurate with that of the railroad company to avoid the infliction of injury.
2. **NEGLIGENCE—Contributory Negligence.**—If the proximate cause of an injury is the negligence of both plaintiff and defendant concurring at the time of the injury, there can, as a general rule, be no recovery. The law recognizes no gradations of fault in such cases.
3. **RAILROADS—Grade-Crossing—Approaching in Vehicle—Speed.**—A party approaching a railroad track in a vehicle must not approach at such rate of speed as that when he reaches a point where he can see or hear a train it is too late to make adequate use of such opportunity for looking and listening as the surroundings of the crossing will admit.
4. **NEGLIGENCE—Self-Imposed Emergency.**—The principle that a person in an emergency or great peril is not required to exercise the care required of prudent persons under ordinary circumstances has no application except in cases where the plaintiff has been placed in a situation of danger by the negligence of the defendant, not united with his own negligence. No such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment.



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Error to a judgment of the Circuit Court of Franklin county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Samuel A. Anderson, L. W. Anderson and W. L. Lee*, for the plaintiff in error.

*Dillard & Dillard, Theodore W. Reath, and Robertson & Wingfield*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by the administrator of J. J. Smith, deceased, to recover of the defendant railway company damages for its alleged negligence in causing the death of the plaintiff's intestate. There was a demurrer to the plaintiff's evidence, which the circuit court sustained. This judgment we are asked to review and reverse.

The plaintiff's intestate was killed at a public road crossing, in the county of Franklin, at a point a little south of Prillaman's Siding. The crossing is shown to be a dangerous one, the view of the railroad to one approaching the track from the north being cut off on the traveller's right by a bluff until he is within a short distance of the track. The public road descends until within a short distance of the track, and then rises until the track is reached.

The intestate was driving a wagon, drawn by a pair of mules, and had almost cleared the track, when he was struck by a regularly scheduled freight train, which was behind time. This train ran regularly from Roanoke in a southerly direction, stopping at Prillaman's Siding when flagged. The intestate is shown to have been an experienced and careful driver, familiar with

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the crossing, and the running of trains at that point. He had been hauling over the crossing for some time, the stave factory at Prillaman's Siding being his point of delivery. On the morning of the accident, the deceased was at Prillaman's Siding in conversation with two others a few moments before he was killed. It is but a few hundred yards on the arc of a circle from "Prillaman's" to the crossing, the public road running this distance around a bluff which cuts off a view of the railroad, the traveller, however, being at no time on the route more than 130 feet distant from the railroad. When a man driving a two-horse wagon reaches a point in the public road, from which, looking up the track to his right, he can see the same for a distance of seventy yards, the heads of his team would be about three feet from the edge of the cross-ties; going a little further so that the driver could see as much as 180 yards up the track, the heads of the team would be "right on the rail." The distance traveled by the mules from the point where they first emerged from the embankment to the point at which they were when the wagon was struck by the train, was fifty-two feet.

The only eye-witnesses of the accident were the engineer and the fireman. Their uncontradicted evidence is that the deceased approached the crossing standing up, whip in one hand and lines in the other, with the team in a run or gallop. The evidence shows that these employees of the railroad saw the deceased as soon as it was possible for them to do so, that the emergency brakes were immediately applied, and everything possible done to avert the accident, but without avail; and that for some distance before reaching the crossing it was down-grade and the train running twenty-five to thirty-five miles per hour. A number of witnesses testify to hearing the whistle blow for Prillaman's Siding, and the noise of the approaching train. The demurrer to the evidence, however, admits that the crossing whistle was not blown, and the act approved January

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18, 1904 (Va. Code, 1904, sec. 1294d) was not complied with. This act had been in force but twenty-five days when the accident happened, on the morning of February 13, 1904; and provides that, where the railroad crosses upon the same level any highway or crossing, the bell shall be rung or whistle sounded continuously or alternately for a distance of not less than 300 yards until the engine has reached such highway crossing.

The negligence of the defendant company in approaching the crossing must be accepted as an established fact; but this negligence does not relieve the traveler on the public highway from vigilance on his part. The duty of such a traveler is to exercise a diligent and watchful care for his own safety. This duty on his part is as imperative as that of the railroad company to look out for him, and to use reasonable care and precaution to avoid injury to his person or his property at a point of possible collision. The vigilance of the traveler to escape injury is commensurate with that of the railroad company to avoid the infliction of injury. When the use of his faculties would apprise the traveler of impending or approaching danger, he must exercise those faculties or suffer the consequences. The greater the danger at a particular crossing, the greater the vigilance required of both. Before crossing a railroad, the traveler on the public highway must use his sense of sight and hearing. He must approach the crossing carefully, and must look in every direction that the rails run to make sure that the crossing is safe; and his failure to do so will, as a general rule, be deemed negligence. Moreover, since the track is a proclamation of danger to the traveler, he must not only use his eyes and ears, looking and listening in both directions, but he must make the acts of looking and listening reasonably effective. If a traveler is warned, or by the exercise of care commensurate with the known danger would be warned of the near approach of a railroad train, then it is his duty to keep off the track until it has passed;

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and to go on the track under such circumstances is negligence, and defeats recovery for injuries inflicted in the resulting collision. Since the negligence of the defendant company does not excuse the non-performance of the traveler's reciprocal duties, it follows that this negligence does not entitle the plaintiff to recover unless it was the sole proximate cause of his injury.

A traveler at a crossing has the right to presume that the company will obey the statute and sound the signal required by law, and to rely on this presumption; but such reliance does not relieve him from care on his part.

These principles, touching the law governing the relative rights of the public and railroad companies at highway crossings, are settled by numerous decisions of this court. *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238; *B. & O. R. Co. v. Few's Ex'or*, 94 Va. 82, 26 S. E. 406; *W. S. Ry. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Southern Ry. Co. v. Bryant*, 95 Va. 212, 28 S. E. 183; *A. & D. Ry. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Brammer v. N. & W. Ry. Co.*, 104 Va. 50, 51 S. E. 211; *Stokes v. So. Ry. Co.*, 104 Va. 817, 52 S. E. 855; *So. Ry. Co. v. Jones*, 106 Va. 412, 56 S. E. 155.

In the light of the principles settled by these decisions, we are of opinion that the plaintiff's intestate was negligent in his approach to the crossing in question—so negligent and lacking in care for his safety as to preclude his right to recover, notwithstanding the negligence of the defendant company in failing to sound the warnings required by law. The law recognizes no gradations of fault in such cases, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called contributory negligence. *Richmond Traction Co. v. Martin's Admr.*, 102 Va. 209, 45 S. E. 886.

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According to the testimony of the engineer and the fireman, who were the only witnesses of the accident, the deceased came upon the crossing standing up, whip in hand, with his team in a run or gallop. The inevitable conclusion from the statement of these witnesses is that the deceased must have come around the bluff in a trot or run, in an effort to get across the track in advance of the approaching train; for, if he had been approaching cautiously and in a walk, and as soon as he came in sight of the train, formed for the first time the purpose to cross the track, he did not have sufficient distance from the point of initial vision to the track of the railroad within which to get his mules into a run. When the deceased reached that point in the public road where he could see 70 yards up the railroad, the heads of his team were in three feet of the track. The physical facts in the case, coupled with the uncontradicted evidence of the engineer and fireman, show that the deceased could not have approached the crossing cautiously with his mules in a walk and under control, for it is manifest that if he had approached the crossing in this manner he would have been unable to get his mules on the rails in a run after his first possible view of the train. The distance in which he had to act did not admit of this.

The conclusion is irresistible, that, when far enough from the crossing for safety, the deceased was moving in a trot or speedy gait, which was lashed into a run as the mules reached the rails, with the hope of crossing the track ahead of the approaching train. This manner of approaching a dangerous crossing was thoughtless negligence, and was the proximate cause which cost the deceased his life. As already seen, the engineer and fireman saw the plaintiff's intestate approaching and on the track as soon as it was possible to do so, and did all that was possible to avert the accident, but it was too late for them to avoid the collision.

A party approaching a railroad track must not approach at

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such a rate of speed as that when he reaches a point where he can see or hear a train it is too late to stop the team and protect himself from injury. *Lacey's Case*, *supra*.

It is insisted that the deceased was lulled into security by the failure of the defendant company to give the required warnings as it approached the crossing; and in support of this contention two cases are relied on—*Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901 and *Railway Co. v. Aldridge*, 101 Va. 142, 43 S. E. 333. In both of these cases there was a local agency of the railroad company for warning travelers on the public highway of an approaching train, which was out of order and out of place. In *Friend's Case* it was a gong, and in *Aldridge's Case* it was a watchman. These agencies of notification, immediately on the ground, upon which the traveler had the right to rely, were silent, thus lulling him into a dangerous position from which he could not extricate himself. But we are aware of no Virginia case which holds, that a traveler on the highway may approach a railroad crossing at such speed, if he is driving a team, as will not allow him to make adequate use of such opportunities for looking and listening as the surroundings of the crossing will admit.

The principle is invoked, on behalf of plaintiff in error, that a person in an emergency or great peril is not required to exercise the prudence required of prudent persons under ordinary circumstances. This principle does not apply except in cases where the plaintiff has been placed in the situation of danger by the negligence of the defendant, not united with his own negligence. *Southwest Imp. Co. v. Smith's Admr.*, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59. "No such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment." *Shear. & Red. on Neg.*, Vol. p. 133, sec. 89.

It is a necessary conclusion from the evidence proper to be considered on the demurrer to the evidence, that the plaintiff's

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intestate was guilty of contributory negligence, and that the defendant could not have saved him from the result. The demurrer was therefore properly sustained, and the judgment of the circuit court must be affirmed.

*Affirmed.*

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**Richmond.**

SOUTHERN RAILWAY CO. v. HANSBROUGH'S ADMINISTRATRIX.

January 16, 1908.

Absent, Keith, P.

1. **NEW TRIAL—Costs of Former Trial—Code, Sec. 3542.**—The provision of section 3542 of the Code requiring a party to whom a new trial is granted to pay the costs of the first trial before the second is had applies only to costs in the trial court, and not to costs in the Court of Appeals incurred upon a writ of error. But, in any event, this burden is only imposed upon the party to whom the new trial is granted, and not upon one who is forced to submit to a new trial because a verdict in his favor has been set aside at the instance of his adversary.
2. **EVIDENCE—Admissibility—Waiver of Objection.**—An objection to evidence which has been improperly admitted will be deemed to have been waived if the objector subsequently introduces the same evidence himself.
3. **NEGLIGENCE—Contributing to Injury—Instructions.**—It is not necessary that a plaintiff's negligence should have *caused* the injury complained of in order to defeat his recovery. It will also be defeated if his negligence proximately contributed to his injury; and where contributory negligence is relied upon as a defense, an instruction which excludes this doctrine from the consideration of the jury is erroneous.
4. **RAILROADS—Grade Crossing—Obstructed View—Negligence—Thoughtlessness.**—It is the duty of one about to cross a railroad at grade at a point where no local agency of the company has lulled him into security, to look and listen in every direction from which trains may come, and to do so at a point where looking and listening will be effective. Thoughtlessness under such circumstances is negligence. If the view of the crossing is obstructed a higher degree of



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care is demanded both of the traveller and of the railroad company than at other points. The vigilance must be in proportion to the known danger.

5. RAILROADS—*Grade Crossing—Negligence of Traveller—Presumptions.*—In an action for death inflicted by a railroad company at a grade crossing, if the evidence tends to show negligence on the part of the plaintiff's intestate, it should be left to the jury to determine from the evidence whether or not he was guilty of negligence proximately contributing to his death, and it is error to instruct the jury that "the presumption is, though slight, that the plaintiff's intestate did his duty and what the law required of him in approaching the crossing." Where the evidence shows the circumstances under which the death was occasioned, the verdict should be based on the facts proved and upon the inferences reasonably to be drawn therefrom, and not upon presumptions.
6. NEGLIGENCE—*Contributory Negligence—Avoiding Consequences.*—In the absence of any evidence of negligence on the part of the defendant after it discovered, or ought to have discovered, the peril of the plaintiff, it is error to instruct the jury on the subject of the discovered or discoverable peril of the plaintiff.
7. RAILROADS—*Unlawful Speed—Proximate Cause of Injury.*—The unlawful rate of speed at which a train is running at the time an injury is inflicted on a traveller at a grade crossing does not create a cause of action, unless it is the sole proximate cause of the injury complained of.
8. INSTRUCTIONS—*Lack of Evidence to Support—Surmises.*—An instruction which permits the jury to look beyond the evidence to establish care and diligence on the part of the plaintiff, and negligence on the part of the defendant, is harmful to the defendant, and is not rendered harmless by the fact that an instruction is given at the instance of the defendant which sets forth his version of the law applicable to the facts dealt with in the plaintiff's instruction given over the objection of the defendant.
9. INSTRUCTIONS—*Contradiction.*—If contradictory instructions on a material point in a case have been given, the verdict should be set aside, as it cannot be known by which the jury were controlled.
10. RAILROADS—*Grade Crossing—Obstructed View—Instructions.*—Where buildings obstruct the view of a grade crossing of a railroad, it is the duty of travellers on the highway and also of the servants of the railroad company, in approaching such crossing, to use care in proportion to the known danger; and, in an action by a traveller against the railroad company for an injury inflicted at such crossing, it is error to instruct the jury, as matter of law, that the

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existence of such obstruction "can in no way affect the plaintiff in this case."

11. INSTRUCTIONS—*No Evidence to Support.*—It is error to give an instruction when there is no evidence in the case which tends to support it.

Error to a judgment of the Circuit Court of the city of Alexandria in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*C. C. Carlin, H. O'B. Cooper, Francis L. Smith and Robert B. Tunstall*, for the plaintiff in error.

*Norton & Boothe*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

When this case was here on a former occasion, the judgment of the circuit court was reversed, because of error in the ruling on the demurrer to the declaration, and the cause remanded for a new trial, the order of the court remanding the case providing, "That the plaintiff in error recover of the defendant in error out of the estate in her hands to be administered its costs by it in this behalf expended."

Upon the calling of the case below for the new trial, it was claimed by the defendant company that the order of this court was, in effect, a new trial awarded to the plaintiff, and that, under section 3542 of the code, the plaintiff, before proceeding to another trial, should be required to pay the costs of the former trial as well as the costs in this court upon the writ of error to the judgment at the first trial. The refusal of the

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circuit court to sustain this contention constitutes the defendant company's first assignment of error to the judgment in favor of the plaintiff at the second trial.

The section of the code relied on is as follows: "The party to whom a new trial is granted shall, previous to such new trial, pay the costs of the former trial, unless the court enter that the new trial is granted for misconduct of the opposite party, who, in such case, may be ordered to pay any costs which seem to the court reasonable. If the party who is to pay the costs of the former trial, fail to pay the same at or before the next term after the new trial is granted, the court may, on the motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict, or award execution for said costs, as may seem to it best." Va. Code 1904, sec. 3542.

Manifestly, the statute applies only to the costs of the former trial in the trial court, and not to the costs in this court incurred upon a writ of error; but if it applied to costs incurred in this court, the defendant could not invoke its provision, since it imposes the burden upon the party obtaining the new trial, and not upon his adversary, who has obtained a judgment in his favor at the former trial and is compelled, but not on his motion, to try his case again. The authorities cited by the defendant company have no application to the record presented upon this second writ of error in the case.

The second trial was had upon an amended declaration, alleging the violation by the defendant company of an ordinance of the city of Alexandria as to the maximum rate of speed of trains passing through the city, and that plaintiff's intestate, by reason of a violation of this ordinance, was killed by the defendant company while he was properly and lawfully using a street to cross the railway track; and, with the view of showing that the deceased did not fail to do what a person of ordinary prudence would have done under the circumstances, evidence was offered to prove obstructions at the crossing rendering the

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looking and listening of the deceased for approaching trains unavailing, and that by reason thereof, he was not guilty of contributory negligence in going upon the railway track in front of the engine with which he collided. Objection was made to the introduction of this evidence, which objection was overruled, and this ruling constitutes the defendant company's second assignment of error.

It suffices to say, with reference to this assignment, that the defendant company is to be taken as having waived objection to this evidence, as it introduced not only evidence as to the surroundings of the crossing where the accident occurred, but photographs thereof, the purpose being the same as that of the plaintiff, to show what were the obstructions in question on the occasion of this accident.

"If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence objected to was incompetent." *N. Y. L. Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Southern Ry. Co. v. Blanford's Admx.*, 105 Va. 373, 54 S. E. 1.

We pass over assignments of error Nos. 3, 4 and 5, with the remark only, that they become immaterial in the view we take of the case on the assignments of error in instructions to the jury.

Viewed as upon a demurrer thereto, the evidence tended to prove the following facts: The decedent, George C. Hansbrough, had been for about ten months prior to the day of the accident causing his death, (May 19, 1904), in the employ, as a driver, of the Belle Pre Bottle Company, whose works are located on the north side of Madison street, near its intersection with Henry street, in the city of Alexandria, Va. During the whole of his employment, deceased had been driving the same horse to the same wagon which he was driving at the time of this accident. He was entirely familiar with the surroundings

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of the crossing of Madison street over Henry street, upon which the main track of the defendant company is located, and no one knew better than he that over and along this track, going north and south, not only regular scheduled passenger and freight trains in considerable numbers passed daily, but extra trains, shifting engines with cars to be distributed upon the yards at Alexandria, and engines running "light," passed frequently and at irregular hours. Deceased passed over this crossing at the intersection of Madison and Henry streets in the line of his employment many times during the day. On the day in question he started out from the Bottle Company's works upon his wagon loaded with boxes filled with bottles, one of which boxes was mounted on the seat occupied by him, and on the boxes at the rear end of the wagon was seated a colored youth, named Johnson. The distance from the gate of the Bottle Company, which opens into Madison street, to the crossing in Henry street, is about 140 feet. Along the greater part of this route on the north side of Madison street there is a shed upon the property of the Bottle Company, which, from a level with the street, is about 9 feet, or 9 feet, 6 inches, at its highest point. The wagon upon which the deceased was seated was very tall, and had attached thereto what is called a foot-board, upon which the feet of the driver rested when seated. The day was bright and clear, and everything quiet; there being nothing to interfere with the hearing of the deceased except the rattling of the wagon and its contents as it journeyed along Madison street to the railroad crossing. The intersection referred to is in the extreme northern end of the city, there being no houses north of the intersection, except, perhaps, one house, the country being open and the view unobstructed for a mile, and as far north as what is known as St. Asaph Junction. Along Madison street to its intersection with Henry street, the obstruction of the view of the railroad track north is almost continuous, except one open space between the office of the Bottle

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Company and the shed, of about 20 feet, through which open space an engine or train may be seen upon the railroad track fully a mile to the north. The railroad track runs along and upon Henry street at grade, northward toward Washington and southward towards Alexandria city. On the occasion of the injury to deceased, an engine of the defendant company, moving from the north towards the south, running "light," *i. e.*, detached from any train, about noon, struck the wagon upon which the deceased and the negro Johnson were riding, at the intersection of the streets named, demolishing the wagon and killing the deceased and the horse, Johnson escaping unhurt. It had been the custom of the defendant company for several years previous to the accident to run this engine down from Washington daily, detached from any train, about the same time of day and on the same track. The horse which the deceased was and had been driving during his employment was gentle, quiet and not at all afraid of trains. The negro Johnson, who was on the rear end of the wagon, was seated with his back towards deceased, upon the top of the boxes which were loaded to the level of the seat upon which deceased was sitting. Johnson was a youth of small stature, while the deceased was a tall man, being five feet, ten and one-half inches in height, and the height of the engine in question from the rail to the top of the cab was thirteen feet, seven inches, and to the top of the smokestack, fourteen feet, nine inches. There was no electric gong, gates or watchman required by ordinance of the city of Alexandria, or permitted, nor had there ever been either at the intersection of Madison and Henry streets. As to the speed of the engine inflicting the injury to deceased, the evidence is, as usual in such cases, conflicting; and such is also the case as to whether or not the bell on the engine was being rung, as required by the city's ordinance; and the plaintiff relies upon the alleged violation of the ordinance of the city with reference to the speed of the engine and the failure to ring the bell as the

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proximate causes of the collision, resulting in the death of her intestate.

For the guidance of the jury in determining the narrow questions of fact submitted to them in this case, the plaintiff asked for and obtained, practically as asked, ten instructions, and the defendant asked for twenty-three; all of the plaintiff's instructions being given over the objection of the defendant, and of the defendant's instructions, four were given without alteration or amendment. Nos. 2, 4, 5, 6, 17 and 21 were refused, and the remainder modified or amended and given; exception being taken to the rulings of the court refusing instructions not granted and modifying or amending others. To review these numerous instructions, or to discuss in detail the exceptions taken to the rulings of the circuit court with reference thereto, would extend this opinion to an unreasonable length, and would serve no good purpose.

We are of opinion that, upon plaintiff's instructions alone, the jury were necessarily confused, if not misled, in considering the facts of the case. Many of them are based upon the decisions of this court in *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901, and *Southern Ry. Co. v. Bryant*, 95 Va. 212, 28 S. E. 183, the facts in both of which are dissimilar to those attending the accident in this case. In the first-named case, the track was obstructed until within a few feet of the rail, and it would have been impossible to have seen the approach of the train while traveling through a cut ten or fifteen feet deep, the obstructions on either side being on the property of the railroad company. On account of the dangerous character of the crossing of the highway over the railroad track, the railroad company some years before had erected immediately east of the crossing, on the north side of the highway, an electric gong or bell, to warn passengers of approaching trains, the silence of which was regarded as an invitation to a traveler to cross the track, and an assurance to him that he could safely do so. In

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the second-named case the evidence tended to show that looking would have been wholly unavailing, and even had Bryant, the deceased, left his wagon and gone to the railroad track and looked, the topography of the country and the curvature of the track were such that he could have seen but a short distance along the track, and could not have avoided the injury. It will be readily seen, therefore, that an instruction based upon the facts of those cases would not apply to the facts of this case.

Here, plaintiff's instruction No. 2 conveyed the idea to the jury that she was entitled to recover unless the injury to her intestate "was caused by his own fault," leaving out of view that if it were true that the deceased was only partially in fault and yet that fault contributed to his injury the plaintiff could not recover. The doctrine of contributory negligence, earnestly relied on by the defendant, was wholly excluded from the consideration of the jury by this instruction.

Instruction No. 4 is as follows: "If the jury believe from the evidence that the defendant was guilty of violating the ordinance of the city of Alexandria which was introduced in evidence, and if they further believe that there is no evidence in this case to the contrary, then the presumption is, though slight, that the plaintiff's intestate did his duty and what the law required of him in approaching the crossing, and they should find for the plaintiff."

It has been over and over repeated in the decided cases, that both a railroad company and a traveler on a highway crossing a railroad track are charged with the mutual duty of keeping a careful lookout for danger, and the degree of vigilance required is in proportion to the known danger—the greater the known danger, the greater the care and precaution required of both the railroad company and the traveler.

In *Mark's Case*, 88 Va. 3, 13 S. E. 300, it is said: "A traveler must be vigilant, and on an intersecting highway, before crossing the railroad, must use his sense of sight and hearing.



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He must look in every direction that the rails run, to make sure that the crossing is safe, and his failure to do so will, as a general rule, be deemed culpable negligence."

What was there said has been often repeated in later decisions, with the emphasis that the looking and listening must be when to look and listen would be effective, and that it is not enough to look and listen at a great distance, or when from other causes looking and listening would be unavailing, but the care must be in proportion to the known danger. *Wash. & So. Ry. Co. v. Lacey*, 94 Va. 466, 26 S. E. 834; *Stokes v. So. Ry. Co.*, 104 Va. 819, 52 S. E. 855; *So. Ry. Co. v. Jones*, 106 Va. 417, 56 S. E. 155.

If the exercise of his faculties would warn him of an approaching train, it is negligence for a traveler to enter on a railroad track, though as a matter of fact he may be oblivious of an approaching train, neither seeing nor hearing it. As was said in *Southern Ry. Co. v. Mauzy*, 98 Va. 219, 37 S. E. 285, thoughtlessness is negligence.

It is not to be lost sight of, in a case like this, that the negligence of the railroad company does not excuse the performance of the traveler's reciprocal duties, as the negligence of the railroad company does not entitle the plaintiff to recover, unless it be the sole proximate cause of the injury complained of. *Railroad Co. v. Reiger*, 95 Va. 418, 28 S. E. 590. The rule is different where the traveler is lulled into security, whereby he is relieved from the imputation of negligence, as in cases in which some local agency of the railroad company is out of place or out of order. In the case of *Kimball & Fink v. Friend*, *supra*, the local agency was a gong which was silent; and in *Southern Ry. Co. v. Aldridge*, 101 Va. 142, 43 S. E. 333, it was a watchman who was out of place.

In this case there were no such agencies—indeed, nothing to relieve the deceased of his duty to take such precautions for his own safety as under the surroundings of his situation, might

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reasonably have been expected of him, and the fact that the defendant was negligent in running its engine at an unlawful rate of speed, and collided with the deceased at a public crossing, did not impose upon the defendant the burden of proving that the deceased did not perform his duty, in that he failed to do a particular thing that he might have done, or did that which, under the circumstances, would not have been done by a reasonably prudent person. The question, whether or not he did what, under the facts and circumstances which the evidence tended to prove, was reasonably to be expected of him, should have been left to the jury, without any expression or intimation from the court as to what weight was to be given to the evidence. It would be a most unreasonable requirement of the defendant in such a case, that it show that the injured party omitted to do what the facts and circumstances proved he might have done and avoided the injury. This would be, in effect, to require proof of a negative, and take from the consideration of the jury the right to infer from the facts and circumstances surrounding the injury that it was the result of the negligence of the party injured, or the concurrent negligence of both parties.

As this court said, in *Southern Ry. Co. v. Aldridge*, *supra*, we have never been called upon to say that it was the duty of a traveler, on approaching an intersection of a railroad track, to stop, look and listen, when looking and listening without stopping would be unavailing; but there is no sanction in that or any other decision of this or any other court of an instruction so well calculated, as is the instruction we are now considering, to mislead the jury to an utter disregard of facts and circumstances which plainly disclose thoughtlessness and a disregard of the known dangers surrounding the traveler, from which reasonably fair-minded men, acting as jurors, might have considered that this thoughtlessness not only contributed to his injury but was its proximate cause.

It was only under the peculiar circumstances of that case

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that the court, in *Southern Ry. Co. v. Bryant*, *supra*, said, that it could not be inferred as a matter of law that Bryant did not listen because he drove upon the track without stopping, the instinct of self-preservation forbidding the imputation of recklessness to any one; that where a traveler approaches a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. But as well stated in the opinion of Harrison, J., in *Newport News P. Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821, the court in Bryant's case was dealing with the presumptions of law attendant upon the absence of evidence, and that where the evidence tends to show negligence on the part of both the plaintiff and the defendant, the verdict of the jury must rest upon the facts proven and the inferences to be reasonably drawn therefrom, and not upon the presumptions of law in favor of either party.

In this case, while the evidence is to be considered sufficient to establish the negligence of the defendant company, it also tended to prove that the deceased had a clear view of the railroad track from the point where he started in the yard of the Bottle Company as far north as about one mile; that, after mounting his seat, ready for the start on the trip he was to make across the railroad track, the deceased could, by the simple act of turning his head and looking to one side, have viewed the track north for the distance mentioned, observed the approaching engine and avoided the collision with it at the intersection of the street, along which he was to make his journey, that, after entering upon Madison street and after going about thirty of forty feet, there was a second view point, through an open space between the office of the Bottle Company, and the obstructing shed, of about twenty feet, through which opening he could have seen up the track in the direction from which the engine was coming for nearly a

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mile, unless this view at the time was obstructed by a pile of lumber, as to which there was some evidence; that, after leaving this last-named point, it is a distance of about ninety or one hundred feet to the east end of the shed nearest the railroad (the only obstruction being the shed), and at any point along the journey, at any distance from the point of collision, the deceased could, by simply rising from his seat upon the front end of the wagon, have looked over the entire shed northward and seen the engine approaching for a considerable distance, certainly in time to have avoided a collision with it; that it had been (as testified to by two of plaintiff's witnesses) the habit of the deceased, to rise from his seat and, standing upon his foot-board, look over this shed for approaching trains; that after clearing the obstruction entirely, and before reaching the track, he could have seen the engine in time to have stopped his horse and avoided the collision, and this without rising from his seat. While to obtain this last view, the horse would have been close to the rail, the evidence is abundant that this was a safe, quiet horse, accustomed to meeting trains hourly, and not at all excited by their presence. The evidence tended to prove, further, that by bending the body and leaning a little forward, the deceased could have seen one hundred and fifty or two hundred feet up the track just as he reached the end of the shed, and by stopping his horse at this point, which he could have done with entire safety, the collision would have been avoided; that, while deceased drove upon the track in front of the approaching engine, resulting as stated in his death and that of the horse, and the destruction of the wagon, the negro Johnson, riding on the rear end of the wagon, with his back to deceased, either heard or saw the approaching engine in time to alight from the wagon and escape injury, and that others farther away heard the engine approaching the crossing.

"It is the duty of a traveler, in the full enjoyment of his faculties of hearing and seeing, upon a highway approaching a

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railroad crossing, before he attempts to pass or drive over, to exercise a proper degree of care and caution, and to make vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and, if by a proper use of his faculties he could have escaped injury and fails to do so, and is injured, he is chargeable with contributory negligence, and cannot maintain an action against the company. And this rule applies, although the railroad company fails to give the proper cautionary signals." *McCanna v. New Eng. R. Co.* 20 R. I. 439, 39 Atl. 891, 10 Am. & Eng. R. Cas. (N. S.) 485, and authorities cited in note to that case. See also the opinion and authorities cited in *Smith's Admr. v. N. & W. Ry. Co. ante*, p. 725, just decided by this court.

In view of the facts which the evidence in this case tended to prove, instruction No. 4 was not only misleading and calculated to create upon the minds of the jury the belief that the court was of opinion that there was no evidence tending to establish the negligence of plaintiff's intestate, but erroneously authorized the jury to rest their verdict upon presumptions in favor of the plaintiff instead of upon the facts proven, and the inferences to be reasonably drawn therefrom.

Instruction No. 5 is erroneous, in that it assumes that the only duty imposed upon the decedent was that of looking, leaving wholly out of view the further duty which the law imposed upon him of listening for the approach of a train. It was well calculated to mislead the jury, for, although the deceased may not have been able to see the approaching engine, he still might have heard it by listening; and it was not incumbent upon the defendant to prove by positive evidence that he neither looked nor listened. All that the defendant could have been required to do was to show facts and circumstances from which reasonable men might draw the inference that had he looked or listened, he would have seen or heard the engine approaching

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in time to have avoided injury, notwithstanding the negligence of the defendant.

The next instruction for the plaintiff complained of, is No. 7, which is as follows: "The court instructs the jury that, although the plaintiff's intestate may have been guilty of negligence, and that, although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the accident which happened, the plaintiff's intestate's negligence will not excuse the defendant company, and the plaintiff is entitled to recover."

This instruction is taken from the case of *Kimball & Fink v. Friend, supra*, and the facts of that case justified the giving of the instruction, but there is no evidence whatever in this case tending to prove that, though the decedent had contributed to his injury, the defendant could, by the use of ordinary care and diligence, have avoided the injury. The uncontradicted evidence is that, when the deceased was discovered upon, or approaching nearly to the track, everything possible was done by the engineer in charge of the approaching engine to avoid a collision with his wagon.

In *C. & S. Rd. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 40 Am. & Eng. R. Cas. (N. S.) 167, it is said: "Where, in an action for death at a railroad crossing, it was conclusively shown that it was impossible for the engineer to avoid collision after he saw the vehicle in which deceased was riding approaching the track, by the exercise of the utmost degree of care, it was error for the court to submit the issue of discovered peril to the jury."

We need not repeat here a citation of the authorities for the proposition of law, that, although the defendant was running its engine at an unlawful rate of speed, this does not create a cause of action, unless it be shown that it was the sole proximate cause of the injury, since the court will not undertake to deter-

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mine which was guilty of the greater fault, but where both are at fault, the plaintiff cannot recover.

There are few disputed facts disclosed by the evidence in this case, the plaintiff's evidence being relied upon mainly to establish the decedent's contributory negligence; therefore, an instruction which permitted the jury to look for ordinary care and diligence beyond the evidence, and to speculate or conjecture as to what the defendant might, could or ought to have done to have avoided the injury to the deceased, is necessarily to be considered as harmful to the defendant. It will not do to say that this instruction was harmless because the defendant asked for and obtained an instruction setting forth its version of the law applicable to a state of facts dealt with in an instruction given for the plaintiff over the objection of the defendant.

This instruction is also to be considered as harmful to the defendant because contradictory of instructions Nos. 15, 16, 18 and 19 given for the defendant.

"When contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside, as it cannot be said whether the jury were controlled by the one or the other." *C. & O. Ry. Co. v. Whitlow*, 104 Va. 90, 51 S. E. 182.

Plaintiff's instruction No. 8 is erroneous for the reason that it tells the jury, as a matter of law, that "the fact that the sheds ran into the street can in no way affect the plaintiff in the case—*i. e.*, plaintiff's intestate could not be held responsible for the sheds being in the street, if there with or without lawful authority, provided they had been in the street sufficiently long prior to the accident to give defendant knowledge of their existence in the street; ignoring the fact shown, that the defendant was in no way responsible for the location of the sheds and their obstruction of the view of a train on its railroad track approaching the crossing in Madison and Henry streets from the north. True, the existence of these sheds imposed

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upon the defendant a greater degree of care in running its engines and trains over the crossing than could have been reasonably required of it had the sheds not been there, but the presence of the sheds in no way relieved the plaintiff's intestate from the exercise of a like degree of care for his own safety in driving upon the railroad track at the crossing. Especially is this true as the deceased, as shown by plaintiff's evidence, had thorough knowledge of the existence of the sheds, and of the manner in which they obstructed the view of the railroad track, imposing upon him, as upon the defendant, the duty to use care "in proportion to the known danger." The instruction is furthermore in direct conflict with instructions granted on behalf of the defendant, which told the jury that these sheds did impose a different duty upon the deceased in approaching the railroad crossing from that which would have been imposed upon him had not the sheds obstructed the view of the railroad track to the north, and it cannot be said by which theory of the instructions the jury were guided.

Instruction No. 10 is not justified by any facts which the evidence in the case tended to prove. It proceeds upon the theory that the deceased was without fault, and was confronted with a sudden danger brought about by the negligence of the defendant, excusing him from the exercise of reasonable care for his own safety. There was nothing whatever in the surroundings of the accident to decedent which could have been construed or considered as an invitation to him to cross the railroad track, and thereby lulling him into the belief that he could safely do so.

A number of other errors are assigned to the rulings of the trial court, and elaborately argued, but we consider that we have sufficiently indicated the views of this court as to the principles of law applicable to the facts which the evidence tended to prove to render it unnecessary to prolong this opinion in a discussion of these assignments.



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We are constrained to again call attention to the prevalent practice of multiplying instructions wholly out of proportion to the necessities of the case, when, as in this case, the controlling facts and circumstances are few, and two or three instructions limited and directed to the material questions presented would have been ample to properly submit the case to the jury.

For the reasons stated, the judgment of the circuit court will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views herein expressed.

*Reversed.*

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CHARLOTTESVILLE AND ALBEMARLE RAILWAY CO. v. RUBIN.

January 16, 1908.

1. APPEAL AND ERROR—*Divided Court—Affirmance—Rule of Necessity.*—

The affirmance of the judgment of a trial court by an equal division of the judges of this court results from necessity, and independently of statute. The former statute in this state on that subject was simply declaratory of a well settled pre-existing rule of necessity which is not changed by the omission from the present statute of anything on the subject.

Motion to rehear a judgment of this court affirming a judgment of the circuit court of Albemarle county by a divided court.

*Rehearing Refused.*

The opinion states the case.

*Harman & Walsh*, for the petitioner.

BY THE COURT.

The petition to rehear in this case proceeds upon the mistaken theory that the order of affirmance is void inasmuch as the present statute (Va. Code, 1904, sec. 3485) makes no express provision, as did the former statute, for judgments by divided court.

The contention is founded upon the misconception that the origin of that procedure is statutory. On the contrary, the statute was merely declaratory of a well-settled, pre-existing rule of necessity.

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"Where the court is equally divided, so far as the point of division goes, the judgment or decree of the court below is affirmed. *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Durant v. Essex Co.*, 7 Wall. 112, 19 L. Ed. 154. Although, where the court is equally divided in opinion upon a writ of error, the judgment of the court below is affirmed, no principle is settled thereby. *Etting v. Bank of U. S.*, 11 Wheat. 59, 6 L. Ed. 419. On a point upon which the judges are equally divided the supreme court will pronounce no opinion. *Benton v. Woolsey*, 12 Pet. 27, 9 L. Ed. 987. Where the court is equally divided, it cannot change the decree of the circuit court, or exercise the discretionary power to allow interest, for this would be a new decree. *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799. A writ of error was dismissed by the supreme court on a division of opinion as to jurisdiction, where a fugitive murderer indicted in Canada was arrested in Vermont under warrant from the governor upon demand for his surrender, and the state court refused to release him on *habeas corpus*. *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579. When the court is equally divided the judgment will be affirmed, with costs. *Bauer v. Texas & P. R. Co.*, 131 U. S. 430, 33 L. Ed. 210, 9 Sup. Ct. Rep. 795; *Moffitt v. Miller*, 34 L. Ed. 539. Equal division of the court on motion for rehearing of a judgment of reversal previously rendered leaves that judgment in force, and does not result in affirming the judgment of the lower court. *Carmichael v. Eberle*, 177 U. S. 63, 44 L. Ed. 672, 20 Sup. Ct. Rep. 571." Taylor on Jur. & Proc. of U. S. Sup. Ct., sec. 441.

The other grounds assigned for a rehearing involve questions already considered, and upon which the court was divided.

For these reasons the prayer of the petition is denied.

*Rehearing refused.*

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**Richmond.**

DURBIN, ASSIGNEE, v. ROANOKE BUILDING CO. AND OTHERS.

January 16, 1908.

1. **DEEDS**—*Description—Street as Boundary—Extent of Grant.*—If the owner of a city lot, which in fact is bounded by a street, conveys the lot without mentioning the street as one of its boundaries, and without manifesting any intention to reserve the street, the legal effect is to invest the grantee with title, subject to the right of way, to the center of the street as effectually as if that boundary had been expressly called for.

Appeal from a decree of the Corporation Court of the city of Roanoke. Decree for defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*Scott, Attizer & Watts*, for the appellant.

*Hart & Hart* and *Lucian H. Cocke*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

The object of this suit is to subject one-half of that portion of a strip of ground fifty feet wide, formerly designated as Walnut street, in the city of Roanoke, lying contiguous to the southern boundary of lot No. 1, conveyed by the Home Building

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and Conveyance Company to the Roanoke Building Company, to the alleged lien of appellant's judgment.

The devolution of title to lot No. 1 is accurately and succinctly set out in the brief of counsel for the appellees as follows: "In October, 1888, the Roanoke Land and Improvement Company conveyed a tract of land in Roanoke city to the Home Building and Conveyance Company, the southern boundary being described as running with Walnut street N.  $67^{\circ} 15' W.$  168.8 feet to Marion street. On the thirteenth day of May, 1890, the Home Building and Conveyance Company conveyed the land by the same description to the Roanoke Building Company. The Roanoke Building Company sub-divided the land into lots, and on the third day of February, 1891, conveyed that one of the lots lying furthest south and abutting on Walnut street, to Joseph Ellis, the southern boundary of the lot being given as N.  $67^{\circ} 16' W.$  156.65 feet, or practically that given in the deeds from the Roanoke Land and Improvement Company to the Home Building and Conveyance Company, and from that company to the Roanoke Building Company (the discrepancy in the length of the line is attributed to cutting off an alley from the side of the lot); but the deed does not state that the line runs with Walnut street. The lot conveyed by this deed is further described as lot No. 1 on a map in the clerk's office of the corporation court of the city of Roanoke."

It is admitted that the first two deeds invested the respective grantees, successively, with one-half of Walnut street, subject to the easement of the right of way; but the appellant denies that such was the operation of the deed from the Roanoke Building Company to Ellis, that deed not specifically calling for Walnut street as the southern boundary of lot No. 1.

Durbin's judgment was recovered against the Roanoke Building Company at the June term, 1893, more than two years after the conveyance of the lot to Ellis; and it is fair to assume that the debt, upon which the judgment is founded, was not in

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existence at that time, since it bears interest from a subsequent date. This suit to enforce the judgment was brought July 16, 1904, nearly fourteen years after the title to the lot had passed out of the judgment debtor. It is also admitted that the appellee, Mrs. Bachrach, the alienee of Ellis, has erected a residence, located in part on the strip of land in dispute, at a cost of \$4,000.

It appears (but at what time the record does not affirmatively disclose) that the location of Walnut street, as originally designated, was changed so as to run in a more southerly direction; the effect of the change being to interpose a small triangular lot between lot No. 1 and the line of the new street. The lot thus created was purchased by Ellis from the Roanoke Land and Improvement Company, February 14, 1891. The location of Walnut street having been once established, in the absence of evidence to the contrary, we must presume that it remained unchanged at the date of Ellis' purchase. The appellant, however, does not attach importance to that circumstance, but rests his right to recover "upon the fact that the street is not called for or mentioned in the deed."

We think it is clear that the conveyance from the Roanoke Building Company to Ellis is coextensive with the calls of the second clause of the deed from the Home Building and Conveyance Company to the Roanoke Building Company, and the southern line of lot No. 1 coincident with Walnut street; and that the legal effect of the deed to Ellis was, to invest him with title, subject to the right of way, to the center of the street, as effectually as if that boundary had been expressly called for.

The general rule is stated in Malone on Real Property Trials, 254, as follows: "The authorities, both in England and America, uniformly agree to the legal proposition, that 'a person holding lands bounded upon a highway is held *prima facie* to own to the center of the road.' This presumption is based on grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is supposed that when the road

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was originally formed, the proprietor on either side contributed a portion of his land for the purpose."

This doctrine has uniformly received the sanction of this court, the latest expression on the subject being found in *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135.

In Tyler's Law of Boundaries, 127, after laying down the general doctrine where the conveyance calls for a highway as a boundary, the learned author observes: "Indeed, it has been held by high authority that when land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee takes the fee to the middle of the highway, on the line of which the land is situated." Citing *Gear v. Barnum*, 37 Conn. 229; *Stark v. Coffin*, 105 Mass. R. 328; *Howsville v. Lander*, 8 Bush (Ky.) 679.

In the first-named case, the rule is stated thus: "It being established that the land is in fact bounded upon the highway, the mere fact that it is not so described in the deed will not vary the construction. In either case, the presumption that it was not the intention of the grantor to withhold his interest in the road to the middle of it, after parting with all his right to the adjoining land, will be the same. Unless such intention clearly appears, the presumption applies."

It may be remarked in this case, as was said in that: "We see nothing in the language of the deed, or in the situation and circumstances of the property conveyed, to warrant the inference that any such intention existed."

If it were permissible to invoke the interpretation placed upon the deed by the parties, it would only tend to strengthen our conclusion. Ellis and his alienee have been suffered to occupy the strip of land all these years, and to erect valuable improvements thereon, without a suggestion of ownership on the part of the Roanoke Building Company, so far as the record discloses.

For these reasons, we are of opinion that the decree appealed from is plainly right, and it must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

McCURDY, EXECUTOR, AND OTHERS v. SMITH AND OTHERS.

January 23, 1908.

1. **CONSTITUTIONAL LAW—Jurisdiction of Courts—Powers Conferred on Clerks of Circuit Court—City Clerks.**—The whole judicial power of the state is vested by Art IV. of the constitution in certain enumerated courts, and such other courts as are thereafter authorized. The General Assembly is authorized by Sec. 101 of the constitution to confer upon the clerks of the several *circuit* courts jurisdiction to admit wills to probate, appoint guardians, etc., but no mention is made of the clerks of other courts.  
**Held:** Section 2639a, Code 1904, conferring such jurisdiction on the clerks of city courts is unconstitutional. Such clerks are not within the terms or intendment of Sec. 101 of the constitution; nor is such jurisdiction conferred by Sec. 98 of the constitution authorizing the legislature to provide "additional courts" for certain cities. The "additional courts" authorized must be courts of similar grade, dignity and jurisdiction to existing city courts.
2. **EXECUTORS AND ADMINISTRATORS—Appointment of Curators—Receivers.**—An order of a court of chancery appointing a receiver of an estate pending litigation over a will will be treated as an appointment of a curator under Sec. 2534, Code 1904, when it appears that the appointment was made after notice, upon a bill supported by affidavit, the allegations of which are not denied by pleading, affidavit, or otherwise.

Appeal from a decree of the Chancery Court of the city of Richmond. Decree for the complainants. Defendants appeal.

*Amended and Affirmed.*

The opinion states the case.

*D. C. Richardson, Page & Leary, Leake & Carter, A. W.*



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*Patterson, McGuire, Riely & Bryan, and Thomason & Minor,*  
for the appellants.

*Beverly T. Crump and Wm. Crump Tucker,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

A paper writing purporting to be the last will and testament of Sarah C. Boswell, deceased, was offered for probate before the clerk of the chancery court of the city of Richmond by H. A. McCurdy, the executor named in the instrument. The proceeding was had under section 2639a, Va. Code, 1904; and the clerk, having heard the testimony of the subscribing witnesses, passed an order admitting the will to probate and allowing McCurdy to qualify as executor. Whereupon, the appellee, W. R. Smith, as one of the heirs at law and distributees of the decedent, filed a bill in the chancery court of the city of Richmond, alleging that Mrs. Boswell had died intestate; that the probate proceedings were null and void, and conferred no authority upon McCurdy; that the plaintiff would contest the validity of the will, if relied on; and, after having made the necessary parties, concluded with a prayer for the appointment of a curator or receiver to take charge of the estate, real and personal, and for general relief.

From a decree declaring the statute, in so far as it attempts to confer jurisdiction on the clerk of the chancery court to admit wills to probate and permit personal representatives to qualify before such clerk, unconstitutional, and the probate proceedings null and void, and appointing a receiver, this appeal was allowed.

Article VI. of the Virginia constitution treats of the composition and distribution of the judicial power of the state. Section 87, under the title, "Judiciary Department, Composi-

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tion and Jurisdiction," declares: "The judiciary department shall consist of a supreme court of appeals, circuit courts, city courts, and such other courts as are hereinafter authorized. The jurisdiction of these tribunals and the judges thereof, except so far as conferred by this constitution, shall be regulated by law."

There can be no escape from the conclusion, that the language of this section manifests the purpose on the part of the framers of the constitution to deal with the judiciary department in its entirety, and limits the power of the legislature, in the establishment of courts, to such tribunals only as are therein specifically enumerated and such other courts as are authorized by the constitution.

In *Carter's Case*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310, the court, in construing section 1 of Article VI of the former constitution (the corresponding section to section 87), remarks: "These courts do not derive their existence from the legislature. They are called into being by the constitution itself, the same authority which creates the legislature and the whole framework of state government."

That is also the construction placed on similar provisions of the constitutions of Michigan and Illinois by the courts of those states.

In *Chandler v. Nash*, 5 Mich. 409, the court observes: "This beyond all controversy, vests the *whole* judicial power of the state in the courts and officers named in this section, unless there be some further provision in the same constitution, conferring upon some other court or officer a part of such judicial power, or authorizing the legislature to confer it; and in the latter case, it can only be possessed or conferred by such further provision expressly or by necessary implication. \* \* \* This must be so upon principle, or the constitution itself must be subject to legislative repeal. It is also well supported by authority. See 2 Story on Const., ss. 1590 to 1592; *State v. City*

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of *Rockford*, 14 Ill. 420; *Gibson v. Emmerson*, 2 Eng. 173." See also *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611; *Knickerbocker v. People*, 102 Ill. 218.

In the latter case it is said: "The validity of the act in question involves a construction of the provisions of the constitution relating to the distribution of the judicial power of the state, and the establishment of courts therein, and also of other provisions supposed to have more or less bearing on the question in hand. Section 1, Article VI. of the constitution provides: 'The judicial power, *except as in this article otherwise provided*, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law in and for cities and incorporated towns.' It is clear, if the constitutional convention had not, in other portions of the constitution, provided for courts other than those specified in the first section, the power of the legislature to establish courts would be confined to such courts as are specifically enumerated in that section; but the convention, as indicated by the exception in the introductory part of the first section, proceeded to provide for the establishment of other courts not enumerated in the first section. The 11th section provides for appellate courts; the 20th for probate courts; the 23rd for the superior court of Cook county; and the 26th for the criminal court of Cook county. These several sections, so far as they relate to the power of the legislature to establish courts, must be construed precisely in the same way as if all the courts had been enumerated in the first section, and the words, '*except as in this article is otherwise provided*,' had been omitted. In that case, the enumeration in the first section would have exhausted the entire judicial power of the state, whereas, as the constitution is constructed, it is only exhausted by the enumeration as contained in the 1st, 11th, 20th, 23rd and 26th sections, and the legislature is authorized to provide for the establishment of these courts, subject to any

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limitations that may apply to them respectively, but for no others."

The assertion in section 87, that the judicial power of the state shall be vested in the courts enumerated therein "and such other courts as are hereinafter authorized," covers the whole ground, and imposes a distinct limitation upon the power of the legislature in dealing with the subject, which it may not transcend. It follows, therefore, that unless authority be found in the constitution empowering the legislature to confer jurisdiction upon the clerk of the chancery court of the city of Richmond for the probate of wills, etc., that provision in section 2639a is unconstitutional.

By section 87, as we have seen, the constitution in general terms authorizes the establishment of circuit courts; and in section 94 divides the state into twenty-four judicial circuits: and in section 101 declares, that "The General Assembly shall have power to confer upon the clerks of the several circuit courts jurisdiction, to be exercised in the manner and under the regulations to be prescribed by law, in the matter of the admission of wills to probate, and of the appointment and qualification of guardians, personal representatives, curators, appraisers and committees of the estates of persons who have been adjudged insane or convicted of felony, and in the matter of the substitution of trustees."

This jurisdiction, outside the cities, was formerly lodged in the county courts, which held monthly terms in each county of the state; but inasmuch as those courts were to be abolished, and the circuit courts only convened once in three or four months, provision had to be made for the convenient and speedy dispatch of those important functions.

By sections 19 and 20 of the schedule of the constitution, the legislature of December, 1901, was called in extra session. July 15, 1902, for the express purpose of enacting such laws as might be deemed proper, "including those necessary to put

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this constitution into complete operation." The members of that body possessed exceptional opportunities for ascertaining the true intent and meaning of the constitution, and their enactments constitute contemporaneous construction of more than ordinary value. The succeeding legislature enacted the amendment under consideration, which was subsequently carried into section 2639a.

It is clear that the clerk of the chancery court of the city of Richmond is neither within the terms nor intendment of section 101. It in terms specifies "the clerks of the several circuit courts;" and the constitution wrought no change in the courts of the cities of the commonwealth, which are practically open at all times for the transaction of business.

Section 98 of the constitution is likewise invoked to sustain the amendment. That section declares, among other things, that: "In any city containing thirty thousand inhabitants or more, the general assembly may provide for such additional courts as the public interests may require, and in every such city the city courts, as they now exist, shall continue until otherwise provided by law."

Applying, as we must do, the doctrine of *ejusdem generis* to the exposition of this language, the "additional courts," which the general assembly may establish, must be courts similar in grade, dignity and jurisdiction to existing courts, and that cannot be predicated of a court clothed with the special and limited jurisdiction conferred on the clerks. *Button v. State Corporation Commission*, 105 Va. 634, 54 S. E. 769, and authorities cited.

Our conclusion, therefore, in this aspect of the case, is that there is no error in the decree of the chancery court.

With respect to the assignment of error touching the appointment of a receiver, it is sufficient to observe, that the order was made after notice, upon a bill supported by affidavit, the allegations of which are not denied by pleading, affidavit or

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otherwise. The order in effect, as we construe it, amounts merely to the appointment of a curator under section 2534 of the code, and was warranted by that statute; and will be so amended as to make that plain.

The cross assignment of error by counsel for the appellees challenges the action of the trial court in excepting from the operation of its decree, directing what property shall be turned over to the receiver, the proceeds of real estate previously sold by H. A. McCurdy to third parties.

Inasmuch as this assignment involves the consideration of important questions which may be materially influenced by subsequent developments, on untried issues likely to arise in the further progress of the case, the court deems it premature to pass upon it at this time.

Upon the whole case, a careful examination of the record fails to disclose reversible error, and the decree appealed from must be affirmed.

*Amended and affirmed.*

**Richmond.****NORFOLK & WESTERN RAILWAY CO. v. DUKE & RUDACILLE.**

January 23, 1908.

1. **APPEAL AND ERROR—Questions Necessarily Involved—Res Judicata—Jurisdiction of Trial Court.**—When this court decides a case on its merits and remands it to the trial court for a new trial, the jurisdiction of the trial court is necessarily involved, and, after the period for rehearing in this court has passed, the decision of that question becomes the law of the case in all courts of the commonwealth. It is immaterial that the question of jurisdiction was not expressly presented and decided. It was necessarily involved.
2. **APPEAL AND ERROR—Questions Involved—Res Judicata.**—Where this court has approved an instruction which in effect construed the contract in suit to be severable, it is not error, on a second trial, for the trial court to refuse an instruction to the effect that the contract was entire.
3. **CONTRACTS—No Time for Performance—Reasonable Time—How Determined.**—If a written contract for the sale and delivery of railroad ties does not specify the time of performance, it is to be performed in a reasonable time, and what is a reasonable time is to be determined by placing the court and jury in the shoes of the contracting parties at the time the contract was entered into. In the case at bar, the uncertain condition of the labor market was the subject of comment at the time the contract was entered into, and hence it was not error to permit plaintiff to show the difficulty he had in securing labor, and the efforts he made to employ hands for the fulfilment of the contract.
4. **CONTRACTS—Performance—Reasonable Time—Evidence—Case at Bar.**—Upon the facts of this case, while neither scarcity nor inability to get hands or timber could excuse the plaintiff from the performance of his contract in a reasonable time, still evidence of such scarcity or inability was admissible, to be considered along with all the other evidence in the case, in determining what constituted

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a reasonable time within which the plaintiff was to perform his contract.

5. VERDICTS—*Evidence to Support*.—This court will not set aside the verdict of a jury if there was sufficient evidence to sustain it.

Error to a judgment of the Circuit Court of Warren county in a proceeding by motion for a judgment for money. Judgment for the plaintiffs. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Downing & Weaver, Marshall McCormick, Theodore W. Reath and John H. Downing*, for the plaintiff in error.

*O'Flaherty & Fulton*, and *E. H. Jackson*, for the defendants in error.

BUCHANAN, J., delivered the opinion of the court.

This case was before this court in the year 1906, under the style of *Duke & Rudacille v. Norfolk & Western Ry. Co.* The proceedings in the case, up to that time, are stated in the opinion of the court, which is reported in 106 Va. 152-160, 55 S. E. 548.

The first error assigned in the petition for this writ of error is that, the proceeding being by motion upon notice under section 3211 of the code, the trial court had no jurisdiction in the manner and form in which it was invoked, under the decision of this court in *Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461.

Whether this contention be correct or not cannot now be considered; for it is well settled that the decision of a case by this court is final and cannot be modified or reversed by any other court of the state, nor even by this court after the adjournment of the term at which it is rendered, except as au-



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thorized by statute. The rendition of a judgment or decree settles the question of jurisdiction, and that and all other matters determined becomes *res judicata* with the finality of such judgment or decree; and this is true where the question raised upon the second appeal or writ of error was necessarily involved on the former appeal or writ of error, whether actually adjudicated or not. *Stuart v. Peyton*, 97 Va. 796, 813, 814, 34 S. E. 696, and cases cited; *Krise v. Ryan*, 90 Va. 711, 713, 19 S. E. 783.

The question of jurisdiction of the circuit court was not expressly presented and decided on the former writ of error, but it was necessarily involved, and when this court remanded the cause for a new trial, it, of necessity, determined that the circuit court had jurisdiction of the case.

The questions raised by the second, third, fifth and seventh assignments of error are also *res judicata*, being determined by the decision of the case upon the former writ of error.

The second error assigned is to the action of the court in refusing to instruct the jury, in substance, that the contract sued on was entire and not severable; and that if they believed from the evidence that the plaintiffs did not deliver all the ties called for in the said contract, then the verdict of the jury must be for the defendant, except as to the 1716 ties mentioned in the plaintiff's bill of particulars.

On the first trial, the jury were instructed as follows: "As to the law applicable to the claim for damages for a failure on the part of the defendant to carry out the contract on its part, where no ties have been tendered by plaintiffs, the court tells the jury that the liability of the defendant depends upon whether the limit prescribed by the defendant within which it would receive ties was a reasonable one. If the said limit of December 31, 1903, was not a reasonable one, then the plaintiffs are entitled to recover damages, the measure of which is fixed by the difference between the contract price and the mar-

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ket price as of January 1, 1904, at the points of delivery specified in the contract, and by the number of ties of either class, not exceeding the number set out in plaintiffs' bill of particulars of each class capable of being delivered by plaintiffs within a reasonable time."

That instruction was approved by this court upon the former writ of error, except in so far as it stated that the measure of damages was the difference between the contract price and the market price of the ties. *Duke & Rudacille v. N. & W. Ry. Co., supra*. And while, by this instruction, the court did not tell the jury in so many words whether or not the contract was entire or severable, it in effect construed it to be severable, otherwise it could not have instructed the jury that in fixing the damages they must be governed "by the number of ties of either class, not exceeding the number set out in plaintiff's bill of particulars of each class, capable of being delivered by plaintiffs within a reasonable time."

The third and fifth assignments of error were to the action of the court in permitting the plaintiffs to show their efforts to purchase tracts of timber other than the three tracts mentioned in the bill of particulars.

This evidence, for the purpose of enabling the jury to determine what would constitute a reasonable time for the delivery of the ties, was admissible under the decision of this court upon the former writ of error, which approved instruction No. 3 given upon the first trial, and which was as follows: "The court tells the jury that what constitutes a reasonable time is left to them to be determined from all the evidence in the case. To this end they may consider the declaration of the parties plaintiffs, or of the agents of the party defendant, whether oral or written, whether previous to said contract or subsequent thereto, as well as the conduct of the said parties, plaintiff or defendant, subsequent to said contract. attaching such weight to such evidence as they may determine."

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The fourth error assigned is based upon the action of the court in permitting one of the plaintiffs to testify that he had a great deal of trouble in securing hands during the summer after the contract was entered into, which was in April, 1903.

No time being specified in the contract within which the ties were to be delivered, the law implies that they were to be delivered within a reasonable time; and what is a reasonable time is to be ascertained, in such a case as this, by placing the court and jury in the same situation as the contracting parties were when the contract was entered into.

The rule and reason on which it is based are stated by Baron Alderson in *Ellis v. Thompson*, 3 Mees. & Welsby 445, one of the leading cases on the subject, as follows: "There is no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time. And it is a question for the jury at the trial; and this was the question put to them: How the reasonable time, which is an implied part of the contract, is to be ascertained. It seems to me that the correct mode of ascertaining it is, in such a case as this" (which was a contract for the delivery of two hundred tons of Bog Mine lead), "by placing the court and jury in the same situation as the contracting parties themselves were in, at the time they made the contract; that is to say, by placing before the jury all the circumstances which were known to both parties at the time the contract itself took place. By so doing you enable the court and jury to form a safer conclusion as to what is the reasonable time, which the law implies and under which the contract itself took place."

In Benjamin on Sales, section 683 (2nd Am. ed.), it is said, in discussing this question: "And when the sale is in writing, if nothing is said as to time, parol evidence is admissible of the facts and circumstances attending the sale, in order to determine what is a reasonable time."

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Chitty (2 Chitty on Contracts, 1062-11 Am. ed.), says, that in such a case the law implies an engagement that the contract shall be "executed within a reasonable time, without reference to extraordinary circumstances." See also *Cocker v. The Franklin &c. Co.*, (J. Story), 3 Sumner, 530, 533; *Grant v. Merchants &c. Bank*, 35 Mich. 516, 523; *Hamilton v. Scully*, 118 Ill. 192, 198, 8 N. E. 767.

Under these authorities, the plaintiffs had no right to prove a change in the labor market in order to determine what was a reasonable time within which to perform their contract. It appears, however, from the record, that before or at the time when the contract was entered into, the plaintiffs called the attention of the defendant's agent to the fact that there was scarcity of labor, and that the agent said he knew it. The condition of the labor market was, therefore, a proper subject to be considered by the jury, and the court did not err in permitting the plaintiffs to show the difficulty they had in securing labor, and the efforts they made to employ hands during the following summer; for this was evidence of their conduct subsequent to the date of the contract, which, under the decision of this court upon the former writ of error, it was held either party had the right to prove.

Another assignment of error is to the refusal of the court to give the following instruction to the jury: "The court instructs the jury that neither the scarcity nor inability to get hands or timber can excuse the plaintiffs from a performance of their contract in a reasonable time."

That evidence was not admitted to excuse the plaintiffs from performing their contract within a reasonable time, but to be considered by the jury, along with all the other evidence in the case, in determining what constituted a reasonable time, as the jury were told in instruction No. 3 given by the court. The rejected instruction was correct as far as it went, but it was incomplete. It ought to have gone further and told the

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jury that while those facts did not excuse the plaintiffs from performing their contract in a reasonable time, they were to be considered by the jury in determining what was a reasonable time in which to perform it.

The court refused to set aside the verdict as contrary to the evidence. This is assigned as error.

Without attempting a discussion of the evidence, which covers some two hundred pages of the printed record, it is only necessary to say that there is sufficient evidence to sustain the verdict of the jury.

The judgment complained of must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.****SOUTHERN RAILWAY CO. v. COMMONWEALTH.**

January 23, 1908.

1. **INTERSTATE COMMERCE—Furnishing Empty Cars—Regulations.**—Furnishing empty cars for an interstate shipment is a necessary part of interstate commerce, and a statute which undertakes to regulate the time, manner and conditions under which such cars shall be furnished, is a regulation of an essential part of interstate commerce.
2. **CONSTITUTIONAL LAW—Test of Validity.**—The constitutional validity of a law is to be tested, not by what has been done under it, but by what may be done.
3. **INTERSTATE COMMERCE—Furnishing Empty Cars—Car Service—Rule I Unreasonable Burden.**—Rule I prescribed by the State Corporation Commission for the government of transportation companies and shippers doing business in this state, which requires such companies unconditionally to furnish empty cars to shippers within four days after application therefor and imposes a penalty for its violation, in so far as it applies to interstate shipments, imposes an unreasonable burden on interstate commerce, and is in conflict with the Act of Congress regulating interstate commerce. Where such burden is imposed it is immaterial what mode of procedure is adopted to enforce the rule, or what penalty is prescribed.
4. **INTERSTATE COMMERCE—Furnishing Cars—Reasonable Regulations by States.**—A state may, in the absence of action by Congress, prescribe rules and regulations for transportation companies and shippers in the matter of furnishing and loading cars for interstate shipments, provided such rules and regulations be reasonable and just, and do not in their application directly infringe upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected thereby. For divergence of opinion on this point, see separate opinions of judges.

Appeal from the State Corporation Commission.

*Reversed.*

The opinion states the case.

*Alfred P. Thom, Robert B. Tunstall and John K. Graves,*  
for the appellant.

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*Attorney-General Wm. A. Anderson*, for the commonwealth.

CARDWELL, J., (with whom KEITH, P., concurs.)

The rules established by the State Corporation Commission for the regulation of transportation companies and shippers doing business in this state came under review in *Atlantic Coast Line Railway Co. v. Commonwealth*, 102 Va. 599, 46 S. E. 911, and it was held that, while said rules and regulations, as applied to transportation companies and shippers doing business in this state, are reasonable, just and valid, whether said rules and regulations do, in their operation, directly infringe upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected by that instrument, can be properly determined only as the questions arise in concrete cases, and upon the particular facts of each case, the court saying: "The State Corporation Commission has no authority to make any rule or regulation in conflict with the constitution of the United States, and if any such rule or regulation is made, which, in its application to the facts of a particular case, violates any right of a defendant protected by the constitution of the United States, he may have its validity tested by an appeal to this court, notwithstanding its refusal to pass on the abstract proposition presented on the present appeal."

A concrete case is presented on this appeal, and arises out of an alleged violation on the part of appellant of Rule I of the series of rules and regulations established by the State Corporation Commission for the government of transportation companies and shippers doing business in this state, which rule is as follows:

"When a shipper makes verbal or written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within four

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days from seven o'clock A. M. the day following such application.

"Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than four days' notice thereof, computing from seven o'clock A. M. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

"For failing to comply with this rule, the company so offending shall forfeit and pay to the shipper applying the sum of \$1.00 per car per day, or fraction of a day's delay after expiration of free time, upon demand in writing, made within thirty days thereafter by the shipper;

*"Provided, however, that this rule shall not apply to shipments of coal and coke from mines and ovens."*

Appellant was cited to appear before the State Corporation Commission at its court room in the city of Richmond on the 2nd day of May, 1906, to show cause, if any it could, why a fine should not be imposed upon it for its violation of law and its public duty, in that it had failed and refused to furnish to one M. W. Cutshall, at Rapidan station, on the line of appellant's railway, in Virginia, certain cars alleged to have been properly ordered by Cutshall for loading, at Rapidan station, the number of cars ordered and the dates on which they were ordered in each instance being stated, and the period of appellant's delinquency in each case named; all of the nine delinquencies alleged, except one, consisting of a delay in furnishing cars for loading telegraph or telephone poles for shipment, either to Calverton station, Baltimore, Md., to Dover, Pa., Camden, N. J., or to North Philadelphia.

On the day named in the citation, appellant appeared and made answer thereto, making objection to the proposed imposition of a fine upon it mainly on the ground that the order of the commission to show cause why a penalty should not be



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imposed upon it was based upon an alleged failure of appellant to furnish a car or cars for the loading of freight for interstate shipment, and that the rule of the commission alleged to have been violated is, as applied to an interstate shipment, or interstate shipments, *ultra vires*, void, and of no effect, because it amounts to a regulation of interstate commerce, or to an unreasonable burden thereon, in either of which cases it is an infringement upon the powers of congress under sub-section 3 of section 8 of article 1 of the constitution of the United States, which confers upon congress the exclusive power to regulate commerce with foreign nations and among the states, etc.

The Commission having considered the testimony adduced, and the objections made by the appellant to the right of the Commission to take action in the case, though finding difficulty, as its order states, in arriving at a satisfactory conclusion, overruled the objection made to Rule I *supra*, as applied to interstate shipments, held the rule valid, imposed upon appellant a fine of \$50.00, and ordered that the fine, together with the costs of the proceeding be paid to the clerk of the Commission within thirty days from the entry of the order.

The assignments of error present for our determination the paramount question, whether or not the application of Rule I to the facts of this case brings it in conflict with the interstate commerce clause of the constitution of the United States, *supra*, and so renders the rule void and of no effect.

The subject of this litigation is of the greatest importance to the transportation companies of the state engaged in the transportation of freight, as well as to shippers of freight, and requires the careful consideration here, which the order appealed from indicates was given it by the State Corporation Commission, charged, as is the Commission, by the constitution and statutes of the state with the duty of fixing and prescribing storage, demurrage and car-service charges, which may be collected by railroad and other transportation companies on freight

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transported or to be transported by them, and to be paid by them on freight delayed and cars not furnished or placed by them when required, with rules and regulations governing the same. *A. C. L. R. Co. v. Com'th, supra.*

That shipments of freight from this state into other states is interstate commerce, requires no argument or citation of authority, but the learned attorney-general contends that the furnishing of empty cars to shippers to be sent into other states is not interstate commerce, nor, indeed, commerce at all, for the reason that, "as a matter of fact, and in legal intendment also, 'commerce' does not begin certainly until the car has been loaded, probably not until its custody has been yielded by the shipper to the transportation company."

It would seem quite difficult, if not impossible, to maintain a distinction between interstate commerce as applied to the article to be transported and interstate commerce as applied to the instrumentalities by which such commerce is carried on, especially in view of the fact that it is not questioned that empty cars furnished shippers to be sent into other states are, after they are loaded and put into the custody of the carrier, instrumentalities of commerce, and, therefore, commerce itself, the exclusive control of which is in congress.

That cars engaged in interstate traffic, although unloaded and not in motion, are instrumentalities of commerce seems clearly settled in *Johnson v. So. Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158, where the question arose, whether a dining car regularly engaged in interstate traffic ceased to be so when waiting for the train to make the next trip, and it was held that it did not; the opinion of the court, after reviewing the contentions of counsel and authorities cited, saying: "Confessedly this dining car was under the control of congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for a train to be made up for

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the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

Instrumentalities of commerce are, *ex necessitate*, a part of commerce, and if a car for an interstate shipment is to be regarded as a necessary instrumentality by which an interstate shipment is to be carried, and in fact a part of the interstate commercial duty of the carrier to furnish, then interstate commerce cannot be confined to the mere act of transit, since receiving, loading, unloading, switching and delivery are as essentially parts of interstate commerce as the act of transit. It would not be contended that a state could forbid any of these things, as a more effectual way of prohibiting interstate commerce could not be devised; and if, instead of undertaking to forbid the furnishing of cars for interstate shipments, or the loading, or switching, or delivery, the state should undertake to regulate all these things, clearly as it would seem upon reason and authority, that would be a regulation of an essential part of interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 214, 29 L. Ed. 158, 5 Sup. Ct. 826; *Stanley v. Wabash R. Co.*, 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549.

A later case more directly in point is *Houston & Texas Cent. R. Co. v. Mayes*, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. 491, (spoken of hereafter in this opinion as the Texas case), in which a provision of the revised statutes of Texas of a similar character and import to Rule I, *supra*, was declared void when applied to interstate commerce, on the ground that it was in conflict with the commerce clause of the Federal constitution.

A comparison of Rule I in question with the Texas statute, condemned in the case just cited, discloses that the rule is more unreasonable and imposes even a greater burden on interstate commerce than the provisions of the Texas statute. While that statute limited the number of cars that might be required, allowed a longer time within which the carrier should furnish them, the time fixed being according to the number of cars ap-

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plied for, the applicant to deposit with the agent of the carrier one-fourth of the amount of the freight charge for the use of the cars applied for, unless the carrier agreed to waive this requirement, and the provisions of the statute "not to apply in cases of strikes or other public calamity." Rule I, under consideration, is absolute in its requirements, making no exception for sudden congestions of traffic occasioned by wrecks or other causes mentioned by the court in the Texas case, which would excuse the carrier. No allowance is made, as in the Texas statute, for the failure to furnish cars within the required time occasioned by a strike or other public calamity, nor does it allow more free time for the furnishing of fifty cars than for one, and no deposit is required to insure the good faith of the shipper. The application may be verbal, or even by telephone, and the shipper not required to designate a point, such as a side-track where loading is practicable, and the number of cars he may order is not limited. Under the requirements of the rule, the equipment of the carrier from other states might have to be withdrawn to an extent necessarily and directly obstructing the movement of interstate commerce originating in such other states.

The rule is not rendered less absolute and inexorable, as contended on behalf of the commonwealth, by Rule XX of the series of rules established by our State Corporation Commission, whereby the Commission reserves the right at all times, and under all circumstances, "whenever justice demands such action, to suspend the operation of these rules, or any one or more of them, in whole or in part." Whether or not the Commission would have had the right to exercise their discretion in the enforcement of the rule in such cases as this, had not Rule XX. been embraced in the series of rules, need not be here determined. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may be done. *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289; *Violette v.*

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*Alexandria*, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep, 825, 31 L. R. A. 382.

In the Texas case the syllabi are as follows:

"An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day to transport merchandise to another state, regardless of every other consideration, except strikes and other public calamities, transcends the police power of the states and amounts to a burden upon interstate commerce; and articles 4497-5000 Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal constitution.

"Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the state."

In the argument of counsel it is said: "The intention of the constitution was to confer the power to regulate interstate commerce exclusively upon congress, and not to divide the power between the state legislature and congress. One of the chief objects of the constitution was to rid commerce of the conflicting vexatious and burdensome restrictions, which, under the articles of confederation, had been imposed by the various states."

In a more recent case (*McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722,) the question involved was, whether or not an order of the North Carolina Corporation Commission, requiring the defendant railway company, upon payment of freight charges, to make delivery beyond its right of way and on a private siding of the Greensboro Coal & Ice Co. of certain cars consigned to the latter company at Greensboro, N. C., from points without the state of North Carolina, was repugnant to the commerce clause of the Federal constitution; and by a unanimous court, the order was held to be invalid, the ruling being rested on the same grounds upon which the appellant here relies as invalidating Rule I of our State Corporation Commission, viz: that the order imposed a

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burden on interstate commerce, and that it conflicted with those provisions of the act to regulate commerce which prohibit unjust discrimination. Among the authorities cited in that case is the Texas case, *supra*.

It is further contended in the argument of the learned attorney-general, that the Texas case is to be distinguished from the case at bar, on the ground that the Texas case was a suit by a shipper to redress a private wrong, and the Texas statute prescribed a penalty of \$25 for each day's delay in furnishing empty cars after the expiration of free time, and in addition thereto the shipper was entitled to recover the actual damages he sustained; while the penalty prescribed by Rule I, *supra*, is only \$1 for each day's delay after the expiration of free time. Nothing, however, appears in the decided cases referred to indicating that the effect of the rule upon the conduct of the carrier in conducting its interstate business is to be measured or determined by either the mode of procedure or the amount of the penalty prescribed for a violation of the statute or rule. True, a penalty may be so great as to invalidate a statute which otherwise would be valid; but, so far as this case is concerned, the amount of the penalty is a minor consideration, and nothing appears to show that it was not so regarded in the Texas case. It is also true that in the Texas case the statute under review, which is similar, in so far as it is an attempt to regulate interstate commerce, to Rule I *supra*, was held invalid on the declared ground that exceptions were not made for cases which might occur, rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a wash-out or sudden congestion of traffic, or unavailable detention of cars in other states or in other places in the same state, or any other circumstances which the court declared should excuse the railroad company from furnishing cars applied for. In other words, the court took judicial notice of the fact that such condi-

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tions might arise, and for that reason the statute was "likely" to do great injustice to the roads, and, therefore, declared that the statute was an unreasonable burden upon interstate commerce, and invalid so far as interstate shipments were concerned, reversing the judgment of the Texas court, that the railroad company should pay the penalties demanded by Mayes as well as actual damages.

In the case before us, circumstances of which the court took judicial notice in the Texas case, as likely to arise, and which should excuse the carrier, are affirmatively established by appellant's uncontroverted testimony. This testimony shows that appellant operates a continuous line of railroad through Virginia, North and South Carolina, Georgia, Alabama, Mississippi, Tennessee, Florida, Kentucky, Indiana and Illinois, and that it operates its freight trains no farther north than Alexandria, Va.; so that a large part of its interstate traffic originating in Virginia, destined to northern points, moves only a short distance over its rails, being delivered at Alexandria to its connections for transportation to destination; that at the time the cars were demanded by Cutshall there was an "unprecedented movement of lumber in open cars;" that Cutshall's freight consisted of telegraph or telephone poles, which required a special class of equipment with special appliances, viz.: flat cars of the same height, fastened together with chains; that the demand was "tremendously active," and that a "very serious shortage in flat cars" had resulted; that the appellant did not have the cars and could not get them, although it used every effort to do so; that the appellant had ordered a large number of cars which it was unable to secure, owing to the fact that the car-builders were far behind in filling their orders. It is made further to appear, that if the cars required by Cutshall had been furnished in the time prescribed by Rule I, *supra*, if they could have been furnished at all, they would have had to be taken from other parts of appellant's line of railway, where

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engaged in interstate or intrastate traffic, and handled empty to Rapidan station, and in all probability a great distance, whereby appellant might have been subjected not only to like penalties to those prescribed by the rule for failure to furnish empty cars, and imposed in this case, but even larger penalties for violation of a statute or rule of another state from which the cars would have had to be withdrawn. It is thus made to appear that the penalty imposed was for a failure to do the impossible or to obey a rule which, when applied to the facts and circumstances made to appear by the proof in the proceeding, imposes not only a direct but an unreasonable burden upon the movement of interstate shipments.

It is not controverted that the authorities maintain the right of a state, in the absence of action by congress, to pass laws or to confer upon an administrative agency the power to make reasonable regulations, which, though incidentally affecting commerce are not intended to prescribe rules for the conduct of that commerce, but are passed or established in the exercise of the police power (called the reserved power) of a state, to promote the welfare and convenience of its citizens, subject always to the condition that such legislation be not inconsistent with the national constitution, nor in derogation of any right granted or secured by it.

Many instances of statutes which have been held within the competency of the state, though affecting interstate commerce indirectly, are mentioned in the opinion by Buchanan, J., in *A. C. L. R. Co. v. Commonwealth*, *supra*, but none of the statutes referred to undertake to control the conduct of the carrier with respect to interstate commerce in a case similar to the one we are considering.

Calvert, in his very recent treatise on the Regulation of Commerce, at page 93, *et seq.*, after declaring that while the power of the state to adopt police regulations which may incidentally burden commerce is admitted, the power is occa-



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sionally so exercised as to be an aid to, rather than a burden on, commerce, and that there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce, and especially is this so with respect to regulations having in view the convenience of the public, as in enforcing track connections between two railroads, and rules for the safety of persons and property, which are to be regarded as legislation in aid of commerce, and are considered with special favor by the courts, further says: "But when a state statute has been enacted which may be said to have relation to the public morals, the public health, the public safety or the public convenience, the subject of which is not within the exclusive power of congress, or which in its operation does not conflict with an act of congress, the last and supreme test is that of reasonableness. \* \* \* A statute passed in pursuance of any of the purposes for which this power may be exercised must have a real or substantial relation to the object for which it was enacted, and if it unreasonably or unnecessarily hampers commerce between the states, or fails to make allowance for the practical difficulties in the administration of the law, it cannot be approved." Citing among others the Texas case, *supra*.

In *Western Union Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934, the statute of Georgia required, under a penalty, prompt delivery and transmission of interstate messages; yet the Supreme Court of the United States declared it valid, on the ground that it did not require of the telegraph company any duties in addition to those imposed upon such companies by the common law, and, therefore, the statute was not a regulation of interstate commerce, because it did not prescribe a rule by which the telegraph company's conduct with respect to interstate messages was to be governed, but

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simply imposed a penalty upon the company for failure to perform its common law duty. In the opinion stress is laid upon the fact that the statute contained no regulation of a nature calculated at all to embarrass, obstruct or impede the company in the full and fair performance of its duty as an interstate sender of messages.

To the same effect is the opinion of this court in *Postal Tel. Co. v. Umstadter*, 103 Va. 742, 50 S. E. 259, where the imposition of the penalty prescribed by section 1291 of the code for a failure to transmit from Norfolk, Va., a message to be delivered in Baltimore, Md., was upheld on the ground that the statute, as applied to the facts of the case, was not a violation of the commerce clause of the constitution of the United States. In the opinion it is said: "It is settled law that a telegraph line is an instrument of commerce, and that telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business."

The reasoning upon which the authorities agree that a state statute, in so far as it imposes a penalty for failure to deliver a message, where the delivery is to be made in another state, infringes upon the exclusive power of congress to control commerce is, that conflict and confusion would follow the attempted exercise by several states of such a power. The same reasoning applies with equal, if not with greater force to the case before us. In the proof it appears that other states through which appellant's railway is operated have a similar statute or rule of regulation to Rule I, *supra*, intended to control transportation companies with respect to their duty in furnishing cars for interstate as well as intrastate shipments of freight, the duty imposed and the penalty for a violation of the prescribed duty being different and in one or more of these states much greater than that provided for in Rule I.

When unprecedented conditions arise, as they will in the future as in the past, whereby appellant cannot possibly fur-

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nish cars to meet the demands of the shippers in each of these states, will it not be natural—in fact a necessity—for it to withdraw the cars in use or needed in this state and send them for the use of shippers in another state, where for a failure to furnish cars the penalty to be suffered is much larger than that incurred by a failure to furnish required cars in this state, whereby conflict and confusion in the conduct of appellant's interstate traffic would not only be brought about, but a direct and unreasonable burden imposed upon interstate commerce? Clearly such a condition of things is not only possible but "likely" to happen, as said in the Texas case. Would not the application of a statute or rule to such a state of facts and circumstances as appear in this record necessarily, directly and unreasonably operate as a hinderance to and interference with interstate commerce? This question has been fully answered in the affirmative, by the decisions of the Supreme Court of the United States, to which we have adverted, and "to which we must look in determining questions of this character." *Southern Ex. Co. v. Goldberg*, 101 Va. 619, 44 S. E. 893, 62 L. R. A. 669.

There is nothing, in the opinion of the court, in the Texas case, *supra*, which denies the right of a state to prescribe a reasonable rule or regulation of transportation companies and shippers in the matter of furnishing and loading cars for interstate as well as intrastate shipments of freight, provided the rule or regulation be reasonable and just, and does not in its application directly infringe upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected by that instrument; but the Texas statute is declared invalid upon the ground that it was unreasonable, in that exceptions were not made for cases which might occur rendering the carrier unable to furnish cars within the time specified, thereby imposing an unreasonable burden

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upon interstate commerce. The opinion in that case concludes as follows:

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

Whether or not congress has exercised its jurisdiction in the the matter of furnishing cars to shippers to be sent to destinations without the state, in the act known as the "act to regulate commerce," as suggested in the argument, whereby the several states of the Union are precluded from prescribing any rule or regulation relating to the subject, is a question we could not consider upon this record. *Texas & Pac. Ry. Co. v. Abilene C. O. Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350.

We are of opinion, for the reasons stated, that Rule I of the series of car service and demurrage rules, established by the State Corporation Commission for the government of transportation companies and shippers doing business in this state, here in question, as applied to this case, is invalid and void, because in conflict with the commerce clause of the constitution of the United States. Therefore, the judgment of the Commission appealed from will be reversed and annulled, and this proceeding dismissed.

WHITTLE, J.:

I concur in the opinion of Judge Cardwell in this case,  
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namely, that Rule I, in question, is not a reasonable exercise of the police power of the state with respect to furnishing cars for interstate shipments, but I desire to emphasize the fact that I am of opinion that it is within the competency of the State Corporation Commission, in the absence of legislation by congress, or action by the Interstate Commerce Commission, to establish and enforce reasonable rules and regulations requiring railroad companies, on application of intending shippers, to supply adequate car service, whether the freight be intended for intrastate or interstate shipment; and that, in the present state of the decisions of the Supreme Court of the United States on the subject of interstate shipments (the controlling influence of which is conceded), the crucial test of the validity of such rule is its reasonableness.

BUCHANAN AND HARRISON, J. J.:

We concur in the conclusion reached by the other members of the court, that Rule I of the State Corporation Commission is invalid, but do not concur in the reasoning by which they reach that conclusion. Their reasoning, if followed to its logical result as we understand it, would not only render the rule in question invalid, but would make it impossible for the State Corporation Commission to make any valid rule on the subject.

We base our conclusion in the case upon the principles announced and the reasons given in the opinion of the Supreme Court of the United States in the case of *Houston &c. R. Co. v. Mayes*, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. 491, which clearly recognizes, as we understand it, the right of the state, under its police or reserved powers, to make reasonable regulations as to the furnishing of cars by railroad companies, not only for intrastate, but also for interstate shipments.

*Reversed.*

Syllabus.

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**Richmond.**

**TAYLOR, RECEIVER, AND OTHERS v. SUTHERLIN-MEADE TO-  
BACCO COMPANY AND OTHERS.**

January 16, 1908.

January 30, 1908.

Absent, Cardwell, J.

1. **ATTACHMENTS—*Affidavit by Secretary and Treasurer of Corporation—Agent.***—An attachment awarded to a corporation as plaintiff, based upon the affidavit of its secretary and treasurer, as such and without more, cannot be maintained. The court cannot say, as a matter of law and in the absence of averment, that the term “secretary and treasurer” necessarily imports the relation of agency between such officer and his corporation within the intentment of the attachment laws of this state, which require the affidavit to be made by “the plaintiff, his agent or attorney.” If he is in fact such agent, it should be so averred in the affidavit. Attachment laws being in derogation of the common law, and harsh in their application, substantial compliance with their requirements must be made to appear on the face of the proceedings.
2. **ATTACHMENTS—*Affidavit—Treasurer as Agent of Corporation.***—The fact that a statute authorizes service of process against a corporation on its treasurer is not a recognition of the treasurer as the representative of the corporation in all legal proceedings.
3. **TAXATION—*Funds in Court—Distribution—Payment of Taxes.***—Upon principle, and also in accordance with the provisions of Sec. 492b. Code, 1904, it is the duty of a court, before distributing a fund under its control, to provide for the payment of taxes and levies due by the debtor whose assets are being distributed. A court, as the representative of the sovereignty of the state, should make no order for the distribution of funds under its control until provision is made for the payment of taxes and levies due to the commonwealth and its municipalities.

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4. APPEAL AND ERROR—*Attachments—Amending of Affidavit.*—Courts acquire jurisdiction of attachments in equity alone by force of the affidavit; and, upon appeal, in a case founded upon an insufficient affidavit, this court can only abate the attachment and dismiss the proceeding, in the absence of an application to the trial court to amend the affidavit. In the absence of statute, it cannot remand the case to the trial court for the purpose of amending the affidavit.

Appeal from a decree of the Corporation Court of the city of Lynchburg in the cases of *Sutherlin-Meade Tobacco Co. v. Commonwealth Tobacco Co. and Others*, and *Butler v. Commonwealth Tobacco Co. and Others*, heard together. From a decree in favor of *Sutherlin-Meade Tobacco Co.* Taylor, Receiver, and Butler appeal.

*Reversed.*

The opinion states the case.

*Scott & Buchanan*, for the appellants.

*Caskie & Coleman* and *Wilson & Manson*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This is an attachment in equity, sued out by the appellees, the Sutherlin-Meade Tobacco Company, against the Commonwealth Tobacco Company, a foreign corporation, formerly engaged in the manufacture of tobacco at Lynchburg, Virginia, to attach the property of the defendant company in this state and subject it to plaintiff's debt.

There was a motion to quash the attachment, because the affidavit upon which it was issued does not show that it was made by "the plaintiff, his agent or attorney," as required by the present statute (Va. Code, 1904, ss. 2959, 2964), which motion was overruled, and the defendant appealed.

It may be well to notice, in this connection, that formerly the statute did not require the affidavit to be made by "the

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plaintiff, his agent or attorney," but provided only, that "On affidavit at the time or after the institution of the suit, \* \* \* the clerk shall issue an attachment," etc. Va. Code, 1873, sec. 2, p. 1009; *Benn v. Hatcher*, 81 Va. 25, 35, 59 Am. Rep. 645.

In this instance, the affidavit was made by the secretary and treasurer of the attaching company, and the single question involved in this preliminary contention is, whether the words "secretary and treasurer," *ex vi termini*, import that such officer is the agent of the corporation.

The rule governing attachment proceedings is thus stated in *McAllister v. Guggenheimer*, 91 Va. 317, 319, 21 S. E. 475: "In this state statutes have been enacted declaring the manner in which the property of such debtors (non-resident debtors) may be subjected to the payment of their liabilities, when there is no lien upon the property for their payment. Independent of these statutes, a court of equity has no jurisdiction to subject such debtor's property in favor of a creditor at large. The remedy invoked in this case being one wholly derived from statute law, and one which is harsh in its operation toward the party against whom it is directed, and also toward the creditors of such debtor over whom the attaching creditor obtains priority, must upon its face show that the requirements of the statute have been substantially complied with." Citing 4 Min. Inst. (last ed.) 404, 5; *Thatcher v. Powell*, 6 Wheat. 119, 15 L. Ed. 221; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Tate v. Liggatt*, 2 Leigh 99, 100; Daniel on Attachments, secs. 11, 12.

In the recent case of *Merriman Co. v. Thomas*, 103 Va. 24, 48 S. E. 490, the court said, in construing an analogous statute requiring the affidavit of "the plaintiff or his agent" to an account filed with a declaration in assumpsit Va. Code, 1904, sec. 3286), that, in the absence of averment of agency in the affidavit, the plaintiff's "book-keeper" would not be held to be his agent, observing: "The statute makes an innovation upon the established mode of procedure in such cases, and a plaintiff, in



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order to take advantage of it, must proceed in accordance with its provisions." The distinction is also drawn between an agent and other employee, and authorities cited to illustrate that distinction:

"An agent is one employed and authorized to represent and act for another, and the distinguishing features of the agent are his representative character and his derivative authority." Mechem on Agency, sec. 1.

The same author thus draws the line of demarcation between the relation of principal and agent and that of master and servant: "The true distinction is to be found in the nature of the undertaking and the time and manner of its performance. Agency properly relates to transactions of business with third persons, and it implies more or less of discretion in the agent as to the time and manner of his performance. Service, on the other hand, has reference to actions upon or about things. It deals chiefly with manual or mechanical execution, in which the servant acts under the direction and control of the master." *Id.* section 2.

The court, at page 28, remarks: "In the Cyclopedia of Law and Procedure, Vol. 2, p. 5, concerning affidavits, and who may make them, it is said, that 'in determining this question reference must always be had to the statutes and rules of court governing the particular affidavit. Thus, where a statute specifically points out who may make a certain affidavit, it can be made by no other than those specified.'

"If the statute had prescribed that the affidavit should be made by the plaintiff in person, then it could have been made by no one else, and when it is declared that it must be made by the 'plaintiff or his agent,' the courts must be content to construe the language employed.

"While a book-keeper may be, and often is, the agent of his employer, the word does not, *ex vi termini*, import that relation, and in the absence of averment in the affidavit that it exists,

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the court cannot by intendment enlarge the ordinary signification of the word so as to bring it within a class to which it may or may not belong."

So in this case, unless the court is prepared to announce, as a matter of law, that the words "secretary and treasurer" necessarily denote the existence of the relation of agency between affiant and the attaching corporation, then the attachment must fall.

The general doctrine is well settled, that the powers of a private corporation, so far as its dealings with third persons are concerned, are primarily lodged in its board of directors, from which source the officers, either expressly or by implication, derive such measure of authority as may be bestowed upon them.

Mr. Cook discusses the subject as follows: "The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. The directors elect the officers, and in this connection it may be added that at common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other. They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it." 2 Cook on Corporations, (5th ed.), sec. 712; Morawetz on Private Corp., sections 509, 510, 511.

With respect to the powers of the president of a corporation, it is said: "The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or

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through its board of directors, formally expressed or implied from a habit or custom of doing business." 10 Cyc. 903; 2 Cook on Corp. (5th ed.) sec. 716; Morawetz on Pri. Corp., sec. 537. See also *Crump v. U. S. Mining Co.*, 7 Gratt. 352, 56 Am. Dec. 116; *Hodges, Ex'or v. Bank*, 22 Gratt. 60.

"The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. The secretary is one of the corporate officers, but he has practically no authority. The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made. The treasurer of a corporation has no power, merely by reason of his office, to contract for the corporation." 2 Cook on Corp. C. 5th ed.) sec. 717. "A secretary is a mere servant, His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Section 717, note.

In 4 Thomp. on Corp., secs. 4714, 4716, the author says of the treasurer of a private corporation, that he is a mere ministerial agent or employee," and that he does not possess "by virtue of his office, any implied or *ex officio* powers of which the courts will take judicial notice." To the same effect is 3 Clark & Marshall on Private Corporations, sec. 703.

These principles are sustained by numerous decisions of courts of the highest respectability, and are laid down by standard writers on private corporations as well settled law.

A number of cases have been adduced by learned counsel for the appellees touching the implied authority of a secretary and treasurer to represent his company.

*Bristol Bank v. Keavy*, 128 Mass. 298, is cited for the proposition that a treasurer can employ an attorney to collect unpaid bills. But the conclusion of the court in that case was largely influenced by the fact that the treasurer was acting "under the immediate direction of one of the officers of the demandant corporation, who had special charge of that class of matters to

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which the one in question belonged." See page 302. In 4 Thomp. on Corp., sec. 4726, that case is explained, and in the later case of *Craft v. So. Boston R. R. Co.*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641, a different conclusion is reached.

In *Whitehall Co. v. Hall*, 102 Va. 284, 46 S. E. 290, the familiar doctrine is announced, that "admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters entrusted to him, are binding upon the corporation. Cook on Corp. (4th ed.) section 726."

In *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351, the president had been held out as having authority to act for the corporation, and the court held that it was bound by his acts. To the same effect are *Ceeder v. Loud &c. Co.*, 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134, and *Sherman Centre Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

In *Ex parte Sergeant*, 17 Vt. 425, it was held that, under a statute requiring "the plaintiff to file an affidavit" (a corporation being plaintiff, and consequently unable to comply literally with the requirement), "the statute would engraft an exception on itself in favor of the agent or head of a corporation," and that the affidavit could be made by "the president of the bank, who is the head of the corporation."

In *St. Louis &c. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069, it was held that the application for a change of venue by a corporation might be verified by the affidavit of any officer or agent of the corporation.

In *Moline &c. v. Curtis* 38 Neb. 520, 57 N. W. 161, the attachment was based on an affidavit which showed on its face that affiants were agents of their corporation, and the trial court allowed the plaintiff to amend by inserting that they were also "Sec'y & Treas.," which it was said cured the "alleged defect."

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In *Chicago &c. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544, the court held the admissions of the president of a railroad company, who had been held out and treated as the executive head of the corporation, made in the ordinary course of his employment, binding upon the company.

In *Forbes Lithograph Mfg. Co. v. Winter*, 107 Mich. 116, 64 N. W. 1053, it was held that an affidavit by an officer of the company, as to the correctness of the account sued on, was sufficient, under the Michigan statute which provided that in any action brought on an account, "if the plaintiff or some one in his behalf" should make an affidavit of the amount due, it should be deemed *prima facie* evidence of such indebtedness.

In the two cases of *Corcoran v. Snow Cattle Co.*, 151 Mass. 72, 23 N. E. 728, and *Merchant's Nat'l Bank v. Gas Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453, it was held that the treasurers of certain trading and manufacturing corporations in that state have authority, by virtue of their office, to make notes on behalf of the company. Mr. Thompson, in discussing the subject, shows that the doctrine of these cases is peculiar to Massachusetts; that it rests upon an established custom which obtains with respect to the dealings of the class of corporations in that state, and is not in accord with the weight of authority elsewhere. Thomp. on Corp., sections 4720-1-2. That the rule is not of universal application even in Massachusetts is shown by the case of *Craft v. South Boston R. Co.*, *supra*.

The reports abound with cases of which the foregoing are examples, in which corporations have been made responsible for acts of persons holding themselves out as agents, sometimes officers of the company transcending the limits of their authority, or even strangers assuming to act and acting as agents, with knowledge of the company; but that class of cases is wholly beside the mark in a case where the company itself is seeking to make an

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act done by one of its officers in excess of his general authority the foundation of rights against another.

We find nothing in these decisions in conflict with the general proposition, that a court cannot take judicial knowledge of the fact that the secretary and treasurer of a private corporation, *virtute officii*, is agent of the corporation in contemplation of the attachment statutes.

The provision found in Va. Code, 1904, sec. 3225, which allows service of process upon the president, treasurer, or other chief officer, etc., of a corporation, is also relied on as legislative recognition of the authority of the treasurer as the legal representative of the corporation in all court proceedings; but it is manifest that the exact language of the enactment is not susceptible of any such broad construction.

Nor are we prepared to concede that a ruling contrary to the contention of the appellees will operate as disastrously upon business enterprise as counsel apprehend. We are placing no restrictive limitation upon the powers of the secretary and treasurer of a private corporation in his transactions with third parties, whether such authority be derived from statute, charter, by-law, custom, or other delegation, express or implied. The extent of our pronouncement is, that the court cannot say, as matter of law, in the absence of averment, that the term "secretary and treasurer" necessarily imports the relation of agency between such officer and his corporation within the intendment of the attachment acts. Correct practice requires the affidavit to aver that affiant is "the plaintiff, his agent or attorney," according to the fact, and compliance with the rule imposes no undue hardship upon the attaching creditor. Daniel on Attachment, sec. 14; Sams on Attachment, pp 190-120.

We are, therefore, of opinion that the trial court erred in overruling the motion of the defendant to abate the attachment.

While this view will operate a dismissal of the bill in the attachment proceeding, and renders consideration of other as-

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signments of error, in that litigation, unnecessary, it leaves unaffected the companion case of *Butler v. The Commonwealth Tobacco Company*.

The latter case is a suit in behalf of all creditors of the company. The bill alleges the pendency of a suit in the chancery court of New Jersey, where the company was chartered, to administer the assets (to which end a receiver had been regularly appointed), and prays that an auxiliary receiver may be appointed to take possession of the Virginia assets, and for their administration under the direction and in accordance with the decrees of the chancery court in the principal case.

The state of Virginia and the city of Lynchburg filed petitions asserting claims against the assets for taxes due by the company for the year 1904.

By the decree appealed from, the trial court held that the Sutherlin-Meade Tobacco Company had a lien upon the tangible chattel property of the debtor corporation, by virtue of its attachment, prior in right to the claim of Taylor, receiver, and to the city of Lynchburg for taxes, but that the city's demand, *quoad* the proceeds of sale of intangible property, was superior to any right or claim of the receiver.

The city assigns cross-error, under Rule VIII, to the priority allowed the Sutherlin-Meade Tobacco Company as to the tangible property.

Though that particular question is no longer vital, we are of opinion that, under the general doctrine which obtains in such cases, and in accordance with the provisions of Va. Code, 1904, sec. 492b, the duty devolved upon the court, before distributing the fund under its control, to provide for payment of taxes and levies due by the company. It would, indeed, be an anomalous result if either the receiver or attaching creditors could come into the courts of the state and invoke their aid to take charge of and administer the assets of an insolvent foreign corporation (thereby preventing the state and city from exer-

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cising their right to levy on the property of such corporation to enforce payment of taxes), and at the same time deny the power of the court to discharge the taxes out of the fund that it is called on to administer.

It is the universal rule that a court, as the representative of the sovereignty of the state, will make no order for the distribution of funds *in custodia legis* until provision is made for payment of taxes and levies due to the commonwealth and its municipalities. Alderson on Receivers, 205; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689; *Greely v. Provident Savings Bank*, 98 Mo. 458, 460, 11 S. W. 980; *Bank v. Ewing*, (C. C. A.) 103 Fed. 168; 2 Cooley on Taxation, 834, also note 5.

For the foregoing reasons, the decree complained of must be reversed, the bill in the attachment case will be dismissed, and the creditors' suit, which was heard with it, will be remanded for further proceedings not in conflict with the views expressed in this opinion.

## UPON A PETITION TO AMEND ORDER.

## BY THE COURT:

The prayer of the petition of the appellees, that the order entered in this case at a former day of the present term be so far modified as to remand the case to the corporation court for the purpose of enabling the appellants to prove the agency of the secretary and treasurer of the company is denied.

Courts acquire jurisdiction in attachments in equity alone by force of the affidavit; and on appeal in a case founded on an insufficient affidavit, this court can only abate the attachment and dismiss the proceeding, in the absence of application to amend the affidavit in the trial court. This seems to be the universal rule in jurisdictions where there is no statutory authority for amending the affidavit.

*Reversed.*



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Statement.

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**Richmond.**

## ADAMS, TRUSTEE, AND OTHERS v. TIDEWATER RAILWAY CO.

January 30, 1908.

1. RAILROADS—*Private Crossings—Proceeding under Code (1904) Sec. 1294b (2).*—The fact that owners of land adjacent to a railroad in their written request to the company demanded eight crossings, while they only designated two in their notice for the appointment of commissioners under Sec. 1294b (2), Code 1904, is not such evidence of bad faith on their part as will warrant the trial court in refusing to appoint commissioners. The railroad company is not prejudiced by the application for only two of the crossings.
2. RAILROADS—*Private Crossings—Roads under Construction.*—The statute providing for the appointment of commissioners to determine whether a railroad company shall be compelled to construct wagon ways across its right of way for the use of abutting owners applies as well to railroads in process of construction as to those in actual operation. The statute is remedial, and should receive a reasonable construction so as to effect the ends for which it was enacted.

Error to a judgment of the Circuit Court of Campbell county in a proceeding by motion to appoint commissioners to establish private crossings of a railroad. Judgment for the defendant. Plaintiffs assign error.

*Reversed.*

The opinion states the case.

*A. S. Hester and Fred Harper*, for the plaintiffs in error.

*Harrison & Long and Robertson, Hall & Woods*, for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

The defendant in error, by condemnation proceedings, acquired title to a strip of land for a right of way for its railroad, extending a considerable distance through a boundary of land belonging to the plaintiffs in error, which was devoted to agricultural purposes. Whereupon, the land-owners served a written request upon the company, soliciting the construction of certain wagon-ways across the right of way, for the convenient use of the property. The company ignored the request, and, after the lapse of ten days, the plaintiffs in error gave formal notice of their purpose to apply to the circuit court for the appointment of commissioners, under section 1294b (2), Va. Code, 1904, to go upon the land in question and determine whether the wagon-ways demanded ought to be constructed.

On the return day of the notice, the court heard evidence touching the matter in controversy, and denied the application, and entered final judgment against the applicants, to which ruling this writ of error was allowed.

So much of the act as is relevant to the question at issue is as follows: "It shall be the duty of every railroad \* \* \* corporation, whose road \* \* \* passes through the lands of any person in this state, to provide proper and suitable wagon ways across said road, \* \* \* from one part of said land to the other, and to keep such ways in good repair. Such ways shall be constructed on the request of the land-owner, in writing, made to any section master, agent or employee of such company, having charge and supervision of the railroad \* \* \* at that point, and shall designate the points at which the wagon ways are desired; \* \* \* If the company fail or refuse for ten days after such request to construct wagon ways of a convenient and proper character at the places designated, then the owner, having given ten days' notice in writing, as aforesaid, may apply to the circuit court of the county \* \* \* wherein the said land is

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located for the appointment of three disinterested persons whose lands do not abut on said railroad, \* \* \* who shall constitute a board of commissioners, whose duty it shall be to go upon the land and determine whether the wagon ways asked for should be constructed. Their decision shall be in writing and, if favorable to the land owner, it shall set forth the points at which the wagon ways should be constructed, giving also a description of what should be done by the company to make a suitable and convenient way. The decision of the commissioners shall be returned to and filed in the clerk's office of such court, and when called up at the next or any succeeding term of said court, it shall be confirmed, unless good cause is shown against it by the company, either party to have the right to appeal to the supreme court of appeals from the judgment of the said court \* \* \*"

The company relies upon the circumstances that the land owners in their written request, demanded eight crossings, while they only designated two in the notice for the appointment of commissioners, as such evidence of bad faith on their part as warranted the court in denying the commission. We do not think the record sustains that inference, or that the company was prejudiced by or can complain of the course of the proprietors in waiving their right to all the crossings except the two specifically described in the notice.

A proper case was presented for the appointment of commissioners, and the action of the court in overruling the motion and primarily substituting its own judgment for the judgment of the commissioners was in violation of the statute, by the express terms of which the court is made the final, but not the initial arbiter of the propriety of directing crossings.

The contention that the statute only applies to completed roads is likewise without merit. The act does not make any distinction between a railroad in process of construction and one in actual operation. The mischief for which the statute is designed to supply a remedy is as great in the one instance as in

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the other. The right of way divides the farm into two parts; it (the right of way) is the property of the railroad company and the land owners have no right to cross it except by permission. They must, therefore, remain at the mercy of the company, so far as ingress and egress from one part of the farm to the other is concerned, until suitable crossings have been established.

This remedial statute ought to receive a reasonable construction, so as to make the remedy commensurate with the right of the land owner and the mischief intended to be redressed, and should not be suffered to fall short of its admitted purpose by a too narrow interpretation.

For these reasons, the judgment of the circuit court must be reversed, and the case remanded for further proceedings, not in conflict with the views expressed in this opinion.

*Reversed.*

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**Richmond.**

JEWETT, v. WARE, SHERIFF, AND OTHERS.

January 30, 1908.

1. **HOMESTEADS—*Judgment for Breach of Contract—Tort—Fraud.***—Where the right of recovery in an action is rested solely upon the ground that the plaintiff has been damaged to a certain amount by a breach of contract on the part of the defendant, and not by reason of a tort, the mere use of violent terms in characterizing the alleged fraud in the procurement of the contract, and its breach, will not suffice to convert the breach of the contract into a tort. Against a judgment obtained in such an action the defendant may claim the benefit of the homestead exemption.

Appeal from a decree of the Circuit Court of the city of Williamsburg and James City county. Decree for the defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*J. N. Stubbs* and *B. H. Ewan*, for the appellant.

*Armistead & Son*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

This is an appeal from a decree dissolving an injunction enjoining and restraining appellee, W. W. Ware, sheriff of the

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city of Williamsburg and the county of James City, from selling certain property claimed by appellant, M. S. Jewett, and set apart by a homestead deed duly executed and recorded, which property had been levied on under an execution sued out by appellee, D. H. Smith.

A number of questions were presented in the pleadings and brought here by assignments of error for consideration, but in our view of the case it is only necessary to determine whether or not appellant is entitled to claim and hold the property as a homestead exemption against the judgment, to satisfy which the execution levied thereon was issued.

In an action denominated as "trespass on the case," brought by appellee, D. H. Smith, against appellant, in the circuit court for the city of Williamsburg and county of James City, a judgment was entered in his favor against appellant for the amount of \$600 and interest, as ascertained by a verdict of a jury, the gravamen of the declaration filed being, that the appellant had, with the consent of appellee, Smith, obtained from a Mrs. Bishop and her husband a certain piece of oyster-planting ground, with oysters and shells therein, containing about forty-six acres, held under a lease from the state of Virginia by the said Mrs. Bishop and her husband, upon which appellee, Smith, held an option of great value, and that appellant, after obtaining the consent of appellee, to a conveyance of said oyster-planting ground from Mrs. Bishop and her husband and had obtained a conveyance of the said oyster-planting ground and the oysters and shells to himself, then and there agreed and promised appellee, Smith, to hold the said oyster-planting ground with oysters and shells thereon in trust for the mutual use and benefit of appellee, and appellant, a consideration to appellee for his consent to have the transfer and assignment of the said oyster-planting ground, etc., to appellant, which promise and agreement appellant thereafter refused to keep and perform, etc., to the damage of the appellee amounting to \$3,000.

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It is not denied that appellant is a householder and head of a family, entitled to claim and set apart a homestead exemption within the purview of the constitution and statutes of the state, nor that his homestead deed setting forth the property claimed by him as a homestead exemption was duly executed and recorded as required by law; and that the property levied on by Sheriff Ware is embraced in appellant's homestead deed is made clearly to appear; therefore, the single question for decision is, whether or not the debt of appellee, Smith, is such that the appellant cannot protect himself against it by claiming a homestead exemption.

Our constitutional provisions for a homestead exemption to a householder and head of a family name specifically the exceptions under which the exemption cannot be claimed, and then provides that these provisions are to be liberally construed, and forbids the impairment or defeat by the general assembly of the benefits of the homestead exemption.

That the claim of appellant to the benefit of the homestead does not come within any of the exceptions specifically named in the constitution, does not admit of discussion, and the sole ground on which it is contended that he is not entitled to claim and have the benefit of the exception is, that the judgment of appellee "was not obtained on a matter *ex contractu*, but on a matter *ex delicto*—not on a contract but for a tort," etc.

The present homestead law does not materially differ from the former constitution and statutes enacted pursuant thereto, and in support of his contention appellee relies upon *Whiteacre, Sheriff, v. Rector & wife*, 29 Gratt. 714, 26 Am. Rep. 420, and *Burton v. Mills*, 78 Va. 468. In those cases and a number of others decided by this court, the right of a debtor to the benefit of the homestead exemption was denied, either because he came within one of the exceptions named in the constitution, or his liability for the debt asserted against him arose out of a tort and not a breach of contract.

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In *Whiteacre &c. v. Rector & wife, supra*, the opinion does say that the exemption does not apply to judgments and executions for torts, but applies only to executions in cases *ex contractu* and not to cases *ex-delicto*; but that case involved the recovery of a fine due the commonwealth.

In *Burton v. Mills, supra*, the liability against which it was sought to avail of the benefit of the homestead exemption was for a "breach of promise of marriage," and the court regarded the breach of the promise of marriage as a *quasi* tort, on the ground that exemplary damages were allowable, in which respect the remedy is widely different from the case of ordinary actions on contracts, where the agreement of the parties controls the measure of remuneration. The opinion, after stating that a contract of marriage is essentially different in many respects from all other contracts, quotes with approval from Sedgewick on Damages, p. 248, where it is said: "Though in form an action *ex contractu*, yet it being impossible, from the nature of the case, to fix any rule or measure of damages, the jury are allowed to take into consideration all the circumstances and permitted to exercise an absolute discretion in the matter of compensation, provided their finding is free from prejudice," etc. It is true that the opinion further says that "the homestead provision in our constitution and laws was intended to give protection to the unfortunate as against debts contracted, and not to fortify the crafty and designing against the consequences of their wrong-doing;" but the court was there speaking of the peculiar facts of that case, and in no case decided by this court, except where the liability arose out of a breach of promise of marriage, involving the question of "tort," was there a contract express or implied between the parties.

In this case, while the declaration upon which the judgment sought to be enforced against the property claimed by appellant as a homestead exemption was obtained, in acrimonious terms charges him with fraud and deceit in procuring the alleged con-



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tract with appellee, it amounts to no more than an assertion of the right of appellee to recover of the appellant damages sustained in consequence of a wrong which grew directly out of a contract between the parties. After all the severe charges against appellant in the declaration, the right of recovery is rested solely upon the ground that appellee had been damaged to a certain amount by a breach of contract on the part of appellant, and not by reason of a tort.

A "tort" is "any civil wrong or injury; a wrongful act (not involving a breach of contract) for which an action will lie; a form of action, in some parts of the United States, for a wrong or injury." Webster's Inter. Dic. p. 1520, 2 Bouv. L. Dict. 1124, 1 Hill on Torts, 1.

The mere use of violent terms in characterizing the procurement of a contract and its breach will not avail to convert a breach of the contract into a "tort," for if it would, the benefits of the homestead exemption provided by our constitution and statutes could be very easily frittered away or made of no avail.

We are of opinion that appellant is clearly entitled to the benefit of his homestead exemption as against the debt asserted against him by appellee, Smith; and, therefore, the decree of the circuit court appealed from must be reversed, and this court will enter the decree which that court should have entered, perpetuating the injunction theretofore awarded in the cause, with costs to appellant.

*Reversed.*

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Statement.

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**Richmond.**

WEBB'S TRUSTEE v. LYNCHBURG SHOE CO.

January 30, 1908.

1. **BANKRUPTCY—Preferences.**—The purpose of the Bankrupt Act was to relieve the bankrupt from his debts and to secure an equal division of his assets among his creditors, and to this end to provide a remedy against every act by which a failing debtor seeks an unequal distribution of his assets among his creditors. Every such act is condemned as being against the spirit and purpose of the bankrupt law.
2. **BANKRUPTCY—Fraudulent Conveyance—Participation by Creditor.**—Under Sec. 67e of the Bankrupt Act the debtor's intent and purpose alone governs in determining whether a conveyance was made with intent to hinder, delay or defraud his creditors. The creditor preferred need not participate in this intent and purpose in order to render the preference void. The Bankrupt Act was intended to afford relief where the common law and the state statutes against fraudulent conveyances afforded none.

Error to a judgment of the Corporation Court of the city of Lynchburg in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Smith & King, Jno. H. Lewis, L. H. Cocke and H. T. Hall,*  
for the plaintiff in error.

*Wilson & Manson,* for the defendant in error.

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HARRISON, J., delivered the opinion of the court.

An opinion was handed down on the 14th day of March, 1907, deciding the questions involved in this case, which is reported in 106 Va. 726, 56 S. E. 581, 1 Va. App. 41. The judgment then rendered was set aside upon a petition to rehear, and the case has been again fully argued.

It is unnecessary to repeat the reasoning and authorities fully and clearly set forth in the former opinion of this court, from which we find no occasion to depart.

The purpose of the bankrupt act was two-fold—first, the relief of the bankrupt from his debts and, second, an equal distribution of his assets among his creditors. The several provisions of the act must be read in the light of these two objects. When this is done, the conclusion cannot be escaped that it was intended to provide a remedy against every act by which a failing debtor seeks an unequal distribution of his assets among his creditors. Every such act is condemned as being against the spirit and purpose of the bankrupt law.

It is insisted that, to justify a recovery in the case at bar, it should be shown that the defendant in error, as well as the bankrupt, had knowledge of and participated in the intent to hinder, delay, and defraud the creditors.

It is sufficiently shown by the former opinion that this position is not tenable. Section 67e, under which recovery is sought, in express terms limits the intent to hinder, delay, etc., to the knowledge of the bankrupt. The language is: "With intent and purpose on his part to hinder, delay or defraud *his* creditors or any of them." The authorities agree that the debtor's intent and purpose, alone, govern in considering section 67e, and that this intent and purpose is a question of fact for the jury.

The chief contention of the defendant in error is that section 67e has reference only to such transfers as are fraudulent at common law, or under a statute of fraudulent conveyances. If

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the meaning of the words, "with intent to hinder, delay or defraud his creditors, or any of them," was limited to such transfers as are fraudulent at common law or under a statute of fraudulent conveyances, section 67e would be useless and practically eliminated from the bankrupt act, for there was no necessity for a bankrupt law to set aside transfers fraudulent at common law or under state statutes. Relief in such cases was already fully provided for. The bankrupt law was intended to afford relief where the common law and state statutes afforded none; and it was just such transfers as we are now considering that section 67e was intended to relieve against.

If the construction of section 67e insisted upon by defendant in error should prevail, it would leave unprovided for the very class of creditors the section was intended to relieve and protect when a failing debtor transfers his whole property to the satisfaction of one creditor to the exclusion of all others; whereas, the construction which has been adopted by this court leaves every provision of the act in full force and effect and meets that large class of cases intended to be protected when a failing debtor, with intent to hinder, delay or defraud some of his creditors, dedicates all of his property to a favored few. To adopt any other construction would give to a failing debtor the power to render null and void the primary purpose of the act, to secure to the creditors of such debtor an equal participation in his estate. A conveyance to one creditor of what would otherwise, under the provisions of the act, go to all, would certainly hinder and delay the others, and be in fraud of the act. In addition to the authorities cited in the opinion already filed, see *In re Gutwillig*, (C. C. A.) 92 F. d. Rep. 337; *In re Gray* (N. Y. Sup. Ct. App. Div.) 3 Am. Bank. Rep. 647; *Sherman v. Luckhardt*, 67 Kan. 682, 74 Pac. 277, 11 Am. Bank. Rep. 26; *Freidman v. Verchofsky*, 105, Ill. App. 415; *Morgan v. First Nat. Bank*, 16 Am. Bank. Rep. 639, 145 Fed. 466; *Rumsey v. Novelty &c. Co.*, (D. C.) 99 Fed. 699.

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For these reasons, the former opinion of this court is adhered to as a correct disposition of the case, and judgment will be entered accordingly.

*Reversed.*

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**Staunton.**

SPILTER &amp; FAUVER v. GUY, REGISTRAR.

AND

SAME v. HUTCHESON AND OTHERS.

September 17, 1907.

1. ELECTIONS—*Illegal Registrations—Purging List—Mandamus.*—Whether a person offering to register is a qualified voter or not is to be determined in the first instance by the registrar, from whose decision an appeal is given to any person denied registration (Code Sec. 83a) and whose list may be purged of those improperly allowed to register upon the application of five qualified voters proceeding in the manner pointed out by sec. 86 of the Code. In view of the nature of the duties devolved upon the registrar and of the remedies afforded by sections 86 and 83a of the Code, *Mandamus* will not lie against a registrar to compel him to purge his list of names alleged to have been improperly registered by him.

Original applications for *mandamus*.*Refused.*

These two cases involve the same question, and were heard and decided together. One was an application for a *mandamus* against the registrar of the first ward of the city of Staunton, and the other an application for a *mandamus* against the registrar of the second ward of said city. The petitioners aver that they are duly qualified and registered voters of said city, and that the defendants are registrars of the first and second wards, respectively, of said city.

The petitioners then charge that no person is entitled to register unless he has been a resident of the state two years, of the

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city one year, and of the precinct in which he offers to vote thirty days next preceding the election in which he offers to vote; that the constitution provides that the general assembly shall enact such laws as are necessary and proper for the purpose of securing the regularity and purity of general, local and private elections, and that the legislature, in pursuance of the constitution, has enacted section 73 of the Code of 1904, which provides, among other things, "that the registrar shall, after the first day of January, nineteen hundred and four, register every male citizen of the United States, of his election district, who shall apply to be registered at the time and in the manner required by law, who shall be twenty-one years of age at the next election, who has been a resident of the state two years, of the county, city or town one year, and of the precinct in which he offers to register thirty days next preceding the election, who, at least six months prior to the election, has paid to the proper officer all state poll taxes, assessed or assessable against him under this or the former constitution for three years next preceding that in which he offers to register."

The petitioners then charge that the registrars have wrongfully and unlawfully registered in the registration book numerous white and colored voters, whose names are enumerated, who had not paid the poll tax, assessable or assessed against them six months prior to the regular election in November, 1907: to-wit, May 6, but had registered said persons upon the books aforesaid since May 6, 1907, and within the aforesaid period of six months of said election, and that the persons enumerated had not on the sixth of May, 1907, paid the poll tax assessed or assessable against them, but that the same have been paid since May 6, 1907, and the prayer of each petition is that the registrar may be compelled by *mandamus* to erase the names of the aforesaid persons from the registration books.

The registrar of the first ward of the city declining to make

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defense, two resident voters of the city duly registered were on their application admitted to defend in his place.

Defendants demurred to the petitions for the *mandamus* on several grounds, but especially and particularly because the petitioners have an adequate remedy under section 86 of the Code, and also because the duty devolved upon them involved the exercise of judgment and discretion.

The petitioners on the other hand insist that application to the registrars to purge their lists would be ineffectual, as they have in effect declared section 73 of the Code unconstitutional, and have registered voters in disregard of it. They deny the right of the registrar to pass upon the constitutionality of the act.

*Turner K. Hackman and Thomas Whitehead*, for the petitioners.

*Patrick & Gordon, Timberlake & Nelson, H. H. Wayt, Charles Curry and F. B. Kennedy*, for the respondents.

BY THE COURT.

This day came again the parties by counsel, and the court, having maturely considered the transcript of the record of the petition aforesaid and arguments of counsel, is of opinion that the petitioners have an adequate remedy by virtue of sections 86 and 83a of the Code of Virginia of 1904, and upon the authority of *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529, the prayer of the petitioners for a writ of *mandamus* is denied; and it is ordered that the respondents recover of the petitioners their costs in their behalf expended.

*Mandamus refused.*



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Syllabus.

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## Staunton.

BARBOUR v. GRIMSLEY, JUDGE.

September 17, 1907.

1. CONSTITUTIONAL LAW—*Acts of Doubtful Validity*.—The federal constitution is a grant of power by the states to the federal government. The state constitution is simply a restraining instrument, and the legislature of the state has all legislative powers not forbidden by the state or federal constitution; and, while this court has power to declare an act of the legislature unconstitutional, it will never do so unless the act is *plainly* unconstitutional. All doubts are resolved in favor of the constitutionality of such acts.
2. CONSTITUTIONAL LAW—*Construction—Read as a Whole—Commissioners of Revenue—Appointment*.—The constitution of the state is to be construed as a whole, and effect given to every sentence of it, if possible. So construing the present constitution, and reading the clauses dividing the powers of the government into legislative, executive, and judicial, and forbidding any person to exercise the powers of more than one at the same time, in connection with section 110 providing that commissioners of the revenue shall be elected or *appointed*, as the *General Assembly may provide*, the latter provision may be regarded as an exception to the general rule, and an act of assembly authorizing circuit courts, or the judges thereof in vacation, to appoint commissioners of the revenue is not unconstitutional on the ground of being an unwarranted commingling of powers.
3. CONSTITUTIONAL LAW—*Act of Doubtful Validity—Practical Construction*.—If a statute conferring upon courts or judges the power to appoint certain officers is of doubtful validity, it will not be declared unconstitutional where it appears that, under the same or similar constitutional provisions, like powers have been conferred by similar statutes which have never been called in question by the courts, nor by two constitutional conventions which have since assembled, but have received the sanction of the legislature, and the inferior courts of the state, and have been acquiesced in for over half a century by all the departments of the state government.

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The practical construction thus put upon such acts will be regarded as decisive of their validity.

4. CONSTITUTIONAL LAW—*Commingleing Powers*.—The provision of the constitution dividing the powers of government into legislative, executive, and judicial, and forbidding any person to exercise the power of more than one of them at the same time, does not forbid the legislature to confer upon a court or judge the power to exercise legislative or executive duties to a limited extent. Governments could not exist if the inhibition on the intermingling of such powers in one person or body were strictly, literally, and unyieldingly applied in every situation.
5. CONSTITUTIONAL LAW—*Commissioners of Revenue—Appointment*.—Upon the principles stated in the foregoing paragraphs, the act of assembly conferring upon circuit courts and the judges thereof in vacation the power to appoint commissioners of the revenue for the several counties of the state is not unconstitutional.

Original application for a writ of prohibition.

*Denied.*

The petition for the writ is as follows:

*“To the Honorable Judges of the Supreme Court of Appeals of Virginia:*

“Your petitioner, John S. Barbour, respectfully shows unto your honors:

“1st. That he is a citizen of the state of Virginia, a resident of Culpeper county within said state, and an owner of real and personal property liable to and assessable for taxation therein.

“2nd. That Daniel A. Grimsley is a resident and property owner and tax-payer within the same county and state and is judge of the circuit court of Culpeper county, and as such is constantly exercising the powers of the judicial department of the government of Virginia.

“3rd. That the county of Culpeper is divided into two revenue districts, one called the Eastern District and the other the Western District, and there is at present a commissioner of

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the revenue duly elected by the people and qualified for each of said offices and authorized to discharge the duties of their respective offices until their successors are elected and qualify.

"4th. That it is the declared purpose and the intent of said Daniel A. Grimsley, judge as aforesaid, either in term time or in vacation of his court and prior to the first day of October, 1907, to undertake to appoint a commissioner of the revenue for each of said districts in succession to the incumbents which would be the exercise of a power properly pertaining to either the legislative or executive departments.

"5th. That his warrant and authority for his intended action is to be found in the provision of chapter 168 of the acts of assembly of Virginia for the year 1906 (Acts 1906, pp. 251-2), purporting to amend section 92 of the Code of Virginia by directing the appointment of commissioners of the revenue by the circuit court of their respective counties or by the judges of such courts in vacation at some time between the first day of July and the first day of October in the year 1907.

"6th. That said act of assembly is contrary to section 5 of the constitution, which provides that the legislative, executive and judiciary departments of the state should be separate and distinct, and is also contrary to section 39 of the constitution, which provides that 'except as hereinafter provided the legislative, executive and judiciary departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the other, nor any person exercise the power of more than one of them at the same time,' and therefore confers no warrant or jurisdiction to the said judge or his court to make said appointments.

"7th. That there is no other provision in the constitution permitting the judges of courts to appoint commissioners of the revenue.

"For these reasons, your petitioner prays that this honorable court may issue its writ of prohibition directed to the honorable

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Daniel A. Grimsley, judge of the circuit court for Culpeper county, prohibiting him or his said court from attempting to make the appointments aforesaid by virtue of the act of assembly aforesaid.

"And your petitioner will, as in duty bound, ever pray, etc.

(SIGNED)

"JNO. S. BARBOUR,

*"Petitioner."*

The answer of Judge Grimsley admits the facts set out in the petition, but denies the invalidity of the statute under which he proposes to act, and, among other reasons, sets forth the following:

"IV. Respondent, as advised, further says that while it may have been held in some jurisdictions, as in the state of Indiana, that the appointment of officers is an executive function which under the provisions of the constitutions of those state, cannot be lawfully devolved upon or exercised by a judge, or by the legislatures of those states, the provisions of section 39 of the Virginia constitution are essentially different from those of the constitutions of the states in which such exercise of the appointing power by the legislature or by a court or judge of such state has been held to be in contravention of the inhibition of the constitution of such state.

"V. He is further advised that in this state, both under the present and under the former constitution (the provisions of which in this regard were similar to those of the present constitution—See article II of constitution, 1851, and article II of constitution of 1869), such powers have been and are now in numerous instances devolved upon the courts and the judges thereof, in a large number of cases, of which the following may be cited as illustrations, all taken from statutes now in force, but many of which had their counterparts in the statutes in force under the two previous constitutions:

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"1. The act empowering the circuit courts, or the judges thereof, to appoint superintendents of the poor. Section 95 of Code of 1904.

"2. Act for the appointment of county surveyor. *Id.*

"3. Act for appointment of members of board of pension commissioners. Clause 12 of section 382a, *Id.*

"4. Act for appointment of assessors of lands. Sec. 437, Code of 1904, as re-enacted in acts of 1906.

"5. Act for appointment of commissioner in chancery to cast deciding vote where there is a tie in boards of supervisors. Sec. 832, *Id.*

"6. Act for appointment of conservators of the peace at watering places and colleges, etc. Sec. 3929, *Id.*

"7. Act for appointment of pilot commissioners for Elizabeth City county. Sec. 1955, *Id.*

"8. Act for appointment of ballast masters. Sec. 1991, *Id.*

"9. Act for appointment of harbor commissioners. Section 2008, *Id.*

"10. Act for appointment of game wardens. Sec. 2070b, *Id.*

"11. Act for appointment of commissioners in chancery. Section 3319, *Id.*

"12. Act for appointment of inspectors of jails. Section 929, *Id.*

"13. Act authorizing appointment of coroners. Sec. 891, *Id.*

"14. Act authorizing appointment of commissioners of accounts. Sec. 2671, *Id.*

"15. Act empowering said courts to remove city and county officers for malfeasance, etc. Sec. 821, *Id.*

"16. Also acts which confer upon said court the power to direct the erection and repair of jails. Secs. 931-933, *Id.*

"And other statutes of like character to those here referred to.

"He is advised and charges that these and other like powers have been again and again, through a period of more than fifty years, conferred upon and exercised by the courts of the state, or

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the judges thereof in vacation, by numerous statutes enacted under the constitutions which contained the same provisions which are expressed in sections 5 and 39 of the present constitution, and that the validity of these statutes, and of the appointments made and acts done under them, have never been questioned; that the present constitution was framed and adopted by a convention, the members of which are presumed to have known that such laws had been enacted, and such functions exercised thereunder by said courts and by the judges thereof, and yet in writing article III, section 39, of the present constitution they failed to modify the language of article II of the constitutions of 1851 and 1869, so as to make them conform to the provisions of the Indiana constitution, or otherwise plainly to prohibit any officers whose duties were chiefly or generally connected with one of the great departments of government from exercising any of the powers which were usually assigned to the officers whose duties were specially related to either of the other departments.

"Respondent is advised that the facts and circumstances mentioned in this paragraph have a two-fold importance in the consideration of the question presented in this cause.

"First: They indicate the magnitude and importance of this question; for if the acts empowering said judges and courts to appoint commissioners of the revenue are invalid, then all, or certainly nearly all, of the long list of statutes above mentioned, and others of similar characteristics, are by the same token equally null and void, as are or may be all of the appointments and acts of said judges and courts made and done under said statutes. The confusion and injury to the commonwealth which would result from such a condition would be calamitous.

"This consideration does not, of course, bear upon the question of constitutional law raised by the petition, further than to demonstrate the serious character of this case, and the importance that it shall receive the most careful and patient considera-

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tion of the court and of counsel, and that the present conditions shall not be changed and uprooted, unless it shall be demonstrated beyond a rational doubt that the act in question is plainly repugnant to the constitution of the state.

"Second: And which he is advised is, as a proposition of law, a more potential inference to be drawn from the long line of legislation and of unchallenged practice thereunder above referred to, is that these statutes, the principle they embody, and the practice thereunder, have thus received the repeated and long continued sanction of legislative construction, the positive approval of the circuit and corporation courts, and the acquiescence of all of the departments of the state government, in one form or another; so that, as respondent is advised, to now adopt another rule of practice, of procedure, and of law, in the matter of all of these appointments and acts of like purport and character, would be not only a disastrous but a revolutionary proceeding, however plausible the technical arguments which may be adduced in its support. He is advised that the principle of the doctrine of *stare decisis* applies with tremendous force to the case thus presented for the adjudication of this honorable court.

"VI. But respondent is advised, and shows your honors, that the very constitution upon which the petitioner relies, in unmistakable and unqualified terms, confers upon the general assembly plenary power in its untrammelled discretion to prescribe the manner in which the commissioners of the revenue shall be appointed, in the event that the General Assembly shall provide for their appointment instead of their election by the people.

"There shall be elected or appointed for four years, as the General Assembly may provide, commissioners of the revenue for each county, the number, duties, and compensation of whom shall be prescribed by law."

"Such is the pregnant and potential language of section 110, article VII, of the constitution.

"The meaning and effect of this language is, as respondent

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is advised, to empower the general assembly to select whatever mode and medium of appointment it may sanction for making these appointments, and in the lawful exercise of the powers thus broadly conferred the General Assembly, in the exercise of its supreme discretion, has chosen to prescribe that these officials shall be appointed by said circuit courts, or the judges thereof in vacation.

"Thus the constitution here provides one of the numerous exceptions to the general rule laid down in section 39, and which is saved by the very terms of that section, which commands that the separation of the departments of government need not be observed where it is otherwise thereafter provided in that instrument. A similar provision is made in section 119, in reference to the election or appointment 'in the manner provided by law,' of commissioners of revenue for the cities.

"VII. Respondent is advised that, according to the rule absolutely settled by the repeated adjudications of this court, the General Assembly of the state is not only supreme, but 'omnipotent,' except where its powers are curtailed by the limitations of the state or the federal constitution, and that a statute duly enacted by that body will be presumed to be valid and constitutional unless it is shown or appears to be unconstitutional beyond a reasonable doubt; that every presumption arises in favor of the constitutionality of such a statute, and every doubt in regard thereto must be resolved in favor of its validity.

"And he is further advised that the preponderance of reason, of precedent, of argument, and of authority is in favor of the validity of the statute sought to be impeached in this proceeding; and that in no view of the case can it be fairly claimed that that enactment is clearly and beyond a rational doubt unconstitutional and invalid.

"Invoking the legal presumption of validity so often approved by this court, he respectfully submits that the act in question should be sustained and the prayer of the petitioner denied."



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*John S. Barbour*, for the petitioner.

*Attorney-General William A. Anderson*, for the respondent.

BY THE COURT.

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the petition aforesaid and arguments of counsel, is of opinion, for reasons set forth in paragraphs four, five, six and seven of the answer of the Honorable Daniel A. Grimsley, judge of the circuit court of Culpeper county, and upon the authority of *Brown v. Epps*, 91 Va. 726, 21 S. E. 119; *Smith v. Bryan, Mayor*, 100 Va., 199, 40 S. E. 652, and *Henrico County v. City of Richmond*, 106 Va., 282, 55 S. E. 683, that the prayer of the petitioner for a writ of prohibition be denied; and that the respondent recover of the petitioner his costs in this behalf expended.

*Writ denied.*

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Syllabus.

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# CRIMINAL CASES.

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## Wytheville.

### YODER v. COMMONWEALTH.

June 13, 1907.

1. **CONTEMPT—Summary Punishment—Code (1904), Sec. 3768.**—The power given to courts and judges by Section 3768 of the Code (1904) to punish “summarily” for contempt is a power to punish without the intervention of a jury, and is limited to the classes of contempt set forth in that section.
2. **CONTEMPT—Regulation—Constitutional Provision.**—The constitutional provision that the General Assembly “may regulate the exercise by courts of the right to punish for contempt” was not intended to clothe the legislature with absolute power over the subject, but meant to confer upon the legislature authority to bring the subject of contempts within reasonable regulations, not inconsistent with the exercise by the courts, with vigor and efficiency, of those functions which are essential to the discharge of their duties. Courts still have the power of self preservation and self protection.
3. **CONTEMPTS—Regulation—Code (1904), Sec. 3768 Constitutional.**—The present statute on the subject of contempts, as contained in Section 3768 of Code 1904, enlarges the classes of cases in which there may be summary punishment, and is a reasonable regulation of the exercise by the courts of the power to punish for contempt. It does not so far abridge or impair the powers of the courts established by the constitution, nor so far diminish their authority, and is not a regulation so unreasonable, as to render them incapable of the efficient exercise of their functions, and hence is constitutional.
4. **CONTEMPT—Code (1904) Sec. 3768—Publication of Insulting Language Concerning Judge.**—The publication in a newspaper of insulting language concerning a judge with respect to any proceeding had in his court cannot be said to be “insulting language addressed to the judge,” and is not within the classes of contempts enumerated in Section 3768 of Code 1904, for which summary punishment may

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be administered by a court or judge; nor is the failure to provide by that section for the summary punishment of such offenses so unreasonable, nor does it so far abridge, diminish and impair the vigor and efficiency of the courts as to render the section unconstitutional.

5. **CONTEMPT—Punishment—Code** (1904), *Sec. 3771*.—The limitation of the duration of the imprisonment for contempt imposed by Section 3771 of the Code applies only to contempts mentioned in the first class of Section 3768, and not to those mentioned in the remaining four classes of that section.

Error to a judgment of the Corporation Court of the city of Lynchburg in a proceeding for contempt.

*Reversed.*

The opinion states the case.

*Montague & Montague* and *A. E. Strode*, for the plaintiff in error.

*Attorney-General William A. Anderson* and *J. T. Coleman*, for the commonwealth.

KEITH, P., delivered the opinion of the court.

A rule was issued by the corporation court of the city of Lynchburg, at its October term, 1906, against Adon A. Yoder, to show cause why he should not be fined for his alleged contempt of court, "in that he did on the . . . . . day of August, on the . . . . . day of September, and on the . . . . . day of October, 1906, within the city of Lynchburg, write, publish and circulate in a certain publication entitled 'The Idea,' certain articles of and concerning the Honorable Frank P. Christian, judge of the corporation court of the said city." The rule referred to in the foregoing order is in the words and figures following, to-wit:

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"We command you that you summon Adon A. Yoder to appear before the judge of our corporation court for the city of Lynchburg at the court-house thereof, on Friday, the 26th day of October, 1906, at 10 o'clock A. M., to show cause, if any he can, why he should not be attached and fined for his contempt of said court in that he did on the ..... day of August, 1906, within the said city, write, publish and circulate in a certain publication entitled 'The Idea,' the following language of and concerning the Honorable Frank P. Christian, judge of the corporation court aforesaid:

"Perhaps the most travelled spot in Lynchburg is the intersection of Twelfth and Main streets, and yet the four corners at this intersection are occupied by bar-rooms. Now, if there be anybody that thinks that this is "suitable and appropriate," let him stand on his head, for I just want to see what he looks like; yet Judge Christian, who grants these licenses, must according to law be "fully satisfied that the place is a suitable and appropriate" one. Now I think that the time has come that we were having a judge who has a sufficient appreciation of the value to the community of the morality of its young men and of the virtue and sense of decency of its young women to keep such a vile thing as a bar-room, certainly, at least, off from the most public spot in the main business street of the town. But Judge Christian has been a judge so long that he has got sor in his ways. He always was a judge of good liquor and now as a judge of the corporation court he has to carry his past sense of "appropriateness" with him.'

"And, also, on the ..... day of September, the following language:

"So many KICKS have come to our notice in the last few weeks that we hardly know where to begin.. Many of them will have to be passed over for the present until we are able to get a few figures to help substantiate the facts. You see, at present, the editor is advertising agent, reporter, editor, super-

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intendent of printing and business manager, and even on occasion newsboy as well. So if we do not let them have it hot enough for you just be patient, for a kick can be made much more effective by getting all data possible before writing.

"For instance, in the August number we had something to say about Judge Christian's granting license to certain bar-rooms on the corner of Twelfth and Main. We have since found out some reasons why the long-faced judge cannot afford to make that spot fit for ladies or gentlemen to pass. The judge is interested in the ownership of one of those rough and tough places, and, therefore, he couldn't refuse to license one without hurting himself. See the point? Besides this, there is another bar-room in town, the rents of which help to fill his coffers. And yet such a man is judge of the corporation court of Lynchburg!

"I am not making an argument for any man who is so degraded a fool as to make any kind of a serious argument for the existence of the saloons. Your conscience, if you have any, condemns you enough. I want you to know that now is the time to let Christian and his like know that you are disgusted with his actions, which are causing the enormous expenditure of the city's money for police and criminal expenses.'

"And also, on the . . . day of October, 1906, the following language:

"Read elsewhere in this number what Sam Jones said about Mayor Smith. Also read what he said about Judge Christian, the church steward, who rents out two or three bar-rooms. Judge Christian knows how unchristian it is, but you see he can get so much more money from bar-keepers than he can from other renters. Yet Judge Christian makes threats every now and then against the bar-keepers for keeping disorderly houses, but they know that his threats are not loaded, for he can't afford to refuse licenses to others when he grants them to his own tenants. You understand?

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“‘Maybe some day we will tell you how this little man came to be judge.’

“And have then and there this writ.”

Yoder appeared in obedience to this rule and filed his answer, from which it appears that he did make the publications as charged in the rule, but he excuses or defends the act upon the ground that it does not constitute a contempt of court, punishable under section 3768 of the Code, which provides, that “The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

“First. Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.

“Second. Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness, or party going to, attending, or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

“Third. Obscene, contemptuous or insulting language addressed to a judge for or in respect of any act, or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding.

“Fourth. Misbehavior of an officer of the court in his official character.

“Fifth. Disobedience or resistance of an officer of the court, juror, witness, or other person to any lawful process, judgment, decree or order of the said court.”

In construing this section, we must first ascertain just what the legislature meant when it said that “The courts and judges may issue attachments for contempt and punish them summarily only in the cases following.”

At common law, the general rule was, that no person could be deprived of his property or his liberty except by the judgment of his peers. To this rule, however, there was an ex-

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ception, and in cases of contempt the offender could be attached, brought at once before the court and punished without the intervention of a jury. Other exceptions relating to minor offenses are enumerated by Blackstone (4 Com. 280) which need not here be specifically mentioned.

In Bouvier's Dict., Vol. 2, under the head of "Summary Proceeding," it is said: "In no case can the party be tried summarily unless when such proceedings are authorized by legislative authority, except perhaps in cases of contempts; for the common law is a stranger to such a mode of trial. 4 Bl. Com. 280; 2 Kent 73."

And in *Jones v. Robins*, 8 Gray 329, it is said, that summary proceeding is a 'form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury. *Brown v. Epps*, 91 Va. 726.

Looking then to section 3768 and the other sections *in pari materia*, and especially section 3771, the conclusion cannot be resisted that the legislature had it in mind that a summary proceeding was one in which the party offending was not to be given a trial by jury, and it was deemed wise to limit the classes of contempts which could thus be tried in the manner provided by the succeeding clause of section 3768.

We shall now examine this section with a view to ascertaining whether or not in its adoption the legislature exceeded the limits imposed by the constitution upon its power, and, secondly, whether or not the offense of which plaintiff in error was found guilty was such as could be, within the terms of the statute, summarily punished; that is to say, without the intervention of a jury.

The subject of contempts was fully considered by this court in the case of *Carter v. Com'th*, 96 Va. 791, and the conclusion was reached, that "there is an inherent power of self-defence

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and self-preservation in the courts of this state created by the constitution. This power may be regulated by the legislature, but cannot be destroyed or so far diminished as to be rendered ineffectual. It is a power necessarily resident in and to be exercised by the court itself, and the legislature cannot deprive such courts of the power to summarily punish for contempts by providing for a jury trial in such case."

Since the decision in that case, the constitution has been amended, and section 63 of that instrument provides, among other grants of power to the General Assembly, that it "may regulate the exercise by courts of the right to punish for contempt." The word "regulate" is here used in the same sense that was given to it in the *Carter Case*, *supra*. The constitution did not intend, we think, to clothe the legislature with absolute power over the subject, but meant to confer upon the legislature authority to bring the subject of contempts within reasonable regulations, not inconsistent with the exercise by the courts, with vigor and efficiency, of those functions which are essential to the discharge of their duties. When the constitution intended to confer plenary power over a subject, it provided with respect to local option and dispensary laws, in section 62, that the General Assembly "shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating or prohibiting the manufacture or sale of intoxicating liquors." If the constitution had intended, by the use of the word "regulate" in section 63, to confer unrestrained authority upon the legislature to deal with the subject of contempts, it would not have been necessary in section 62 to add the words "controlling" and "prohibiting" with respect to the manufacture or sale of intoxicating liquors, but it would have been sufficient to have said that they might be regulated by the general assembly. In other words, we are of opinion that the decision in the case of *Carter v. Com'th* would have been a sound



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exposition of the law under the present constitution as well as under that of 1869.

The act of 1897-8, which was under review in *Carter's Case*, is different from that now found in the Code of 1904, under which this case arose. The present law contains a new subdivision, or class, as it is called, as follows: "Third. Obscene, contemptuous or insulting language addressed to a judge for or in respect of any act, or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing, for or in respect of such act or proceeding."

"Fifth. Disobedience or resistance of an officer of the court, juror, witness, or other person to any lawful process, judgment, decree, or order of the said court."

Comparing this fifth clause with the fourth clause as it appears in the act of 1897-8, it will be observed that the words "other person" are introduced after the word "witness," so that under the present act the disobedience or resistance, not only of an officer, juror or witness, is punishable summarily by the court, but all other persons are embraced, which is an essential addition to the vigor and efficiency of the law.

We cannot say of the present law that it so far deprives the courts of the power of self-defense and self-preservation with respect to contempts, or so far diminishes their power to enforce their judgments, as to render them incapable of the efficient discharge of the duties committed to their care. Upon that ground this court rested its judgment in the *Carter case* and held the act then under consideration to be such an invasion of the authority of the courts as to require them in the discharge of their duties in order to preserve their powers unimpaired as confided to them by the constitution then in force, to declare that act null and void. Taking section 3768 as it stands, we are of opinion that on the whole it is a reasonable regulation of the exercise by the courts of the power to punish for contempt. It may at least be said that it does not so far

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abridge or impair the powers of the courts established by the constitution, that it does not so far diminish their authority, and that it is not a regulation so unreasonable as to render them incapable of the efficient exercise of their functions.

The question becomes then one as to the construction of the statute. It is obvious that if the offense charged be covered by the statute it must be embraced within the third class, as obscene, contemptuous or insulting language addressed to a judge.

That the language used is insulting, is beyond question; and that it was wholly without justification is equally true. The judge to whom it refers has no need of any defense from us. That he was elected to preside over a court of unlimited civil and criminal jurisdiction in the city of Lynchburg, that he has been re-elected to that position by the General Assembly of this state, would seem to furnish abundant evidence to refute the charges made or insinuated against him. Indeed, the charges themselves are but the incoherent utterances of a partisan of the cause of prohibition against a judge who issued licenses to sell intoxicating liquors at a place in a large city which did not meet the approval of plaintiff in error, and the *gravamen* of the attack upon the judge is, that he held as trustee the bare legal title to the premises occupied by one of the applicants to whom he granted a license.

The defamatory articles mentioned in the rule were printed in a newspaper of which plaintiff in error was owner and publisher; and the question is, whether or not an article so published in an impersonal way can be considered as "addressed to" the judge "for or in respect of any act or proceeding had, or to be had, in such court."

Looking to the mischief to which the remedy was to be applied, it would seem to require the court to give a meaning to these words which would embrace the publication under consideration, and would make the act apply to any obscene, contemptuous, or insulting language, written or spoken of or con-

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cerning a judge with respect to any act or proceeding had or to be had in his court; but it is doubtful whether the phrase adopted by the general assembly is susceptible of that interpretation.

Webster's Dictionary defines the verb "To address" to mean "To direct, as words (to any one or any thing); to make, as a speech, petition, etc. (to any one, an audience). To direct speech to; to make a communication to, whether spoken or written; to apply to by words, as by a speech, petition, etc.; to speak to; to accost. To direct in writing, as a letter; to superscribe or to direct and transmit; as, he addressed a letter."

The argument in favor of the narrow interpretation gains force from the subsequent language of the clause, "Or like language used in his presence and intended for his hearing, for or in respect of such act or proceeding."

Upon the whole, we are of opinion that the words are to be taken as meaning that the language, whether spoken or written, was to be specifically addressed to the judge. This conclusion does not fully supply a remedy for the mischief, we admit. It still leaves a judge, however innocent, at the mercy of slander and libel, however false and however calculated to degrade the court and to bring it into disrepute and contempt. But we cannot say that the omission in the act regulating contempts to provide for the punishment of such offences is so unreasonable, or so far abridges, diminishes and impairs the vigor and efficiency of the courts, as to render it unconstitutional; and we repeat that nothing short of that result would justify this court in holding this statute to be unconstitutional.

It was argued, among other things, that the judge of the corporation court could not have proceeded under section 3768, because his judgment sentences plaintiff in error to confinement for fifteen days, while under section 3771 the court was limited to the imposition of a fine of \$50 and imprisonment not more than ten days; but this is obviously incorrect. Section 3771

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provides that "No court shall, without a jury, for any such contempt as is mentioned in the first class embraced in section thirty-seven hundred and sixty-eight, impose a fine exceeding fifty dollars, or imprison more than ten days." The first class is, "Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." But the limitation of section 3771 does not apply to the second, third, fourth and fifth classes into which section 3768 is divided. We have little doubt, however, that the judgment of the corporation court was rendered upon the theory that none of the subdivisions of section 3768 were applicable to this offense, and that the court proceeded under the general power to punish for contempt, being of opinion that the legislature had exceeded its authority in providing that the courts and judges could issue attachments for contempts and punish them summarily only in the cases stated in section 3768.

We are of opinion that the judgment of the corporation court should be reversed.

*Reversed.*

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**Wytheville.**

WELLS v. COMMONWEALTH.

June 13, 1907.

1. **CRIMINAL LAW—Misdemeanors—Sunday Laws.**—The violation of the Sabbath law as contained in Section 3799 of the Code is not a misdemeanor, and the forfeiture imposed therefor is recoverable only by a civil warrant, and not by a criminal warrant against the offender. The fact that this section is contained in a chapter of the Code which treats of "offenses against morality and decency" does not indicate that its breach is a misdemeanor. The mere collocation of a statute is not a conclusive test of its character.

Error to a judgment of the Circuit Court of Henrico county. The defendant was president of the Richmond Amusement Corporation, and was arrested, tried and convicted for giving a performance on Sunday.

*Reversed.*

The opinion states the case.

*Wyndham R. Meredith*, for the plaintiff in error.

*Robert Catlett*, Assistant to Attorney-General, for the commonwealth.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, Jake Wells, was arrested, tried, convicted and fined \$2.00 and costs of prosecution upon a criminal warrant issued by a justice of the peace under section 3799, Va.

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Code, 1904, for a violation of the Sabbath day. On appeal to the circuit court of Henrico county, the conviction was sustained, and the case is before us on writ of error to the judgment of affirmance.

The initial assignment of error, indeed the only assignment which demands our attention, questions the correctness of the trial court's action in overruling the motion of the plaintiff in error to quash the warrant, on the ground that the forfeiture imposed by the statute can only be recovered by civil warrant. The contention involves the construction of section 3799. If a violation of that act constitutes a misdemeanor, a justice of the peace has jurisdiction to issue a criminal warrant against the offender, and upon conviction to enforce payment of the fine imposed in the mode prescribed by section 717. If, on the other hand, a breach of the statute is not a misdemeanor, the forfeiture can only be recovered by civil warrant.

The section is as follows: "If a person on the Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offence. \* \* \* From any judgment rendered under this section, the right of appeal shall lie to the defendant within ten days, to the corporation or hustings court of the city, or to the circuit court of the county wherein said judgment is rendered; and when taken shall be proceeded in as appeals in misdemeanor cases."

It will be observed that the statute does not in terms declare that a violation of its provisions shall be a misdemeanor. In fact, the contrary intention is to be inferred both from the provisions and phraseology of the enactment. Thus, if the violation of the act were a misdemeanor, the allowance of an appeal would be unnecessary, since the right of the accused to an appeal in such case is guaranteed by section 8 of the constitution of Virginia and by general statute, section 4107.

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Again, the appeal is from "any judgment" rendered under the section, language applicable to a civil case rather than to a misdemeanor, where the term "conviction" would be more apposite. So also, it is provided in the last paragraph of the section, that the appeal "shall be proceeded in as appeals in misdemeanor cases," which expression would not only be inappropriate if applied to a misdemeanor, but moreover indicates a conscious knowledge on the part of the legislature that the accused already has the right of appeal in that class of cases.

From this analysis of the statute, we conclude that a violation of the Sabbath law, as set forth in section 3799, cannot be held to be a misdemeanor.

Assuming that the forfeiture is a "fine," within the meaning of section 745, let us next examine the mode prescribed for its collection.

Section 712 provides, that "Where any statute imposes a fine, unless it be otherwise expressly provided, or would be inconsistent with the manifest intention of the General Assembly, it shall be to the commonwealth and recoverable by presentment, indictment or information. Where a fine without corporal punishment is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited, by action of debt, or action on the case, or by motion. The proceeding shall be in the name of the commonwealth."

Section 3983 devolves upon the grand jury the duty of presenting all felonies, misdemeanors, and violations of penal statutes; "except that no presentment shall be made of a matter for which there is no corporal punishment, but only a fine, where the fine is limited to an amount not exceeding five dollars." And section 3904 declares, "that no fine shall be assessed by a jury, or court, at less than five dollars, or by a justice at less than two dollars and fifty cents, unless otherwise provided by law."

These enactments make it clear that the forfeiture in this

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case is not recoverable by presentment, indictment or information, under section 712; while the latter paragraph of the section in terms provides for its recovery *by warrant*. Applying the rule of *noscitur a sociis*, the term "warrant" in the connection in which it occurs means civil warrant.

"It is a fundamental principle in the construction of statutes, that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated." 26 Am. & Eng. Enc. L., 608; *O. & A. R. Co. v. Alexandria*, 17 Gratt. 176; *Gates v. Richmond*, 103 Va. 702, 705, 49 S. E. 965.

This construction of the act is also conformable to section 2939, which provides for the recovery by civil warrant of fines not exceeding twenty dollars.

The learned annotator of the Code, in a note to section 3799, observes: "The fine prescribed is recoverable before a justice and by civil warrant." The enactment is similarly construed in Mayo's Guide (ed. 1892) 616, where it is said: "The offense of working on the Sabbath day is within the jurisdiction of a justice to try and should be proceeded against by summons." So, at page 410, it is said: "In addition to this general provision, section 2939, a justice has jurisdiction as by warrant or summons in the nature of a civil proceeding for the enforcement and recovery of fine of \$20.00 and less, under sections 712 and 713 of the Code. It is plain from these sections, that in a proceeding to recover a fine not exceeding \$20.00, the justice can only proceed by a summons to appear, and not by warrant of arrest. It may be well to call the attention of the justice to the distinction to be observed here, that where the fine imposed for a violation of a statute does not exceed \$20.00, and no corporal punishment is or may be added, his only jurisdiction is to proceed by a summons to appear."

Two decisions of this court are invoked by the attorney-general to sustain the judgment under review: *Ex parte Marx*, 86



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Va. 43, 9 S. E. 475, and *Jernigan's Case*, 104 Va. 850, 52 S. E. 361. In the former case, the proceeding was by civil warrant to recover the forfeiture for a violation of the Sabbath; therefore, the statement that the penalty might also have been recovered by warrant of arrest was not necessary to the decision of the case; and the common law rule, as set forth in the opinion, is, as we have seen, modified by statute. The latter case arose under an act which in terms provides for the arrest and commitment of the offender unless and until the fine and costs are paid, and is therefore not in point.

The sections of the Code to which we have already referred prescribe the mode of procedure for the recovery of the forfeiture imposed by section 3799 by civil warrant, and afford no authority in such case for proceeding by warrant of arrest.

It may be observed that the inference that might otherwise be drawn from the history of legislation against Sabbath-breaking, that a violation of section 3799 is a misdemeanor, loses its significance in light of the legislative intention plainly manifested by the language of the enactment and kindred statutes to which attention has been called.

Nor does the circumstance that the section is found in chapter 185, which treats of "offences against morality and decency," indicate that its breach is a misdemeanor. It is a penal statute, passed in the interest of good morals, and is therefore appropriately classified. But if such were not the fact, this court has repeatedly held, that mere collocation of a statute is no conclusive test of its character. *City of Danville v. Hatcher*, 101 Va. 523, 535, 44 S. E. 723; *Litton's Case*, 101 Va. 833, 847, 44 S. E. 923.

For these reasons, the judgment must be reversed; and this court will proceed to enter such judgment as the circuit court ought to have rendered, and sustain the motion of the plaintiff in error to quash the warrant.

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Dissenting Opinion.

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BUCHANAN, J., (dissenting.)

I cannot concur in the opinion of the court, that a violation of section 3799 of the Code of 1904 is not a misdemeanor. To reach that conclusion it is necessary to hold that a violation of that section is not a criminal offense, for all offenses which are not felonies are misdemeanors. Code, sec. 3879. Minor's Crimes & Punishments, p. 17.

The statute prohibits Sunday work with certain exceptions, and imposes a penalty for its violation for the benefit of the state, thus possessing the essential elements of a criminal statute. *Jernigan's Case*, 104 Va. 850, 52 S. E. 361 and authorities cited.

The history of the legislation on the subject I think shows that the statute is a part of the criminal law of the state, and its violation a misdemeanor.

In the year 1779 an act was passed, entitled "An act for punishing disturbers of religious worship and Sabbath breakers," by which it was provided, among other things, that "If any person on the Sabbath day shall himself be found laboring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labor of other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant or slave so employed and every day he shall be so employed as constituting a distinct offence." 12 Hening's Stat. at Large, pp. 286-7.

In the year 1792 it was re-enacted as section 5 of an act, entitled "An act for the suppression of vice and punishing disturbers of religious worship and Sabbath breakers." See Continuation of Hening's Stat. at Large, Vol. 1, p. 192-3. The statute as amended was carried into the Code of 1819 (Code, 1819, Ch. 441, sec. 5, pp. 554-5), and was in force when Prof.

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Dissenting Opinion.

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Davis published his work on "Criminal Law" in 1838. He understood the statute to be a part of the criminal law of the state, and that a violation of it was a misdemeanor, and so treated it in Ch. 21 of his work, under the head of "Misdemeanors Affecting the Public Police and Economy," pages 303-343.

Without material change, that statute was carried into the "Criminal Code" of the state, passed March 14, 1848, (Acts 1847-8, pp. 93, 94, 110, 112), which afterwards became a part of the code of 1849, under the general title of "Crimes and Punishments," page 722, and is in the chapter entitled "Of Offences against Morality and Decency." Code, 1849, ch. 196, sec. 16. In the revision of the criminal laws of the state by the act approved March 14, 1878, and in the Code of 1887; the section is found under the same general title (acts 1877-8, p. 279; Code, 1887, p. 877), and in the chapter entitled "Of Offences against Morality and Decency and the Protection of Religious Meetings," acts 1877-8, pp. 301, 304. Code, 1887, ch. 185, sec. 3799, pp. 898, 900.

In making their revision, the revisors were directed to arrange all the statutes under appropriate titles and chapters. Acts 1883-4, pp. 702-3; Preface to code of 1849, p. VII. It is clear, as it seems to me, from the titles under which and the chapters in which the Sunday statute is found, that the revisors of both codes, who were very learned lawyers, understood that statute to be a part of the criminal law of the state. That these titles, chapters and tables of contents may be looked to as showing the cotemporaneous construction of the code by the revisors when engaged in their work, see *Shumate v. Com'th*, 15 Gratt. 653, 658. If they had not so thought, it would have been their duty to have placed the statute under some other title and in some other chapter of their work. Professor Minor, in his work on Criminal Law, so construed the statute and was of

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Dissenting Opinion.

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opinion that a violation of it was a misdemeanor. Min. Syn. of Cr. Law (1894), pp. 183-4.

The statute on the subject in force in the state of West Virginia for many years was taken from our statute, and was substantially the same as that found in the codes of 1849 and 1887. Its violation in that state was regarded as a misdemeanor, and offenders were punished accordingly. *State v. B. & O. R. Co.*, 15 W. Va. 362, 370, 36 Am. Rep. 803; *State v. Railroad Co.*, 24 W. Va. 783, 49 Am. Rep. 290; *State v. McBee*, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638.

In the case of *Ex Parte Marx*, 86 Va. 40, 9 S. E. 475, although not necessary, perhaps, to a decision of the case, the violation of the statute was held to be an offense for which the accused could be arrested on a criminal warrant.

By an act approved March 2, 1904, (Acts 1904, p. 79), section 3799, as found in the code of 1887 and as it had existed substantially from 1779, was amended by having added to it the following words: "From any judgment rendered under this section, the right of appeal shall lie to the defendant within ten days, to the corporation or hustings court of the city, or to the circuit court of the county wherein said judgment is rendered, and when taken shall be proceeded in as appeals in misdemeanor cases."

If section 3799, prior to that amendment, was a part of the criminal law of the state, and its violation a misdemeanor, as I think I have shown it was, did that amendment change its character and render its violation no longer a misdemeanor? It is true, as stated in the opinion of the court in discussing the section as amended, that it does not in terms declare that a violation of the section is a misdemeanor. Many statutes whose violations are admittedly misdemeanors, do not in terms so declare. But that is not necessary. If an offence be punishable by fine or imprisonment, or both, it is thereby constituted a misdemeanor in the absence of such designation. Davis Cr.

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Law, 223. The violation of sections 3787, 3789, 3792, 3796b, 3797, 3798, 3801 and 3803a of the same chapter are not declared in terms to be misdemeanors, yet there can be no question that they are.

If section 3799, as amended, was an entirely new provision in our law, there would be much force in the view expressed in the opinion of the court that its violation was not a misdemeanor; but when the amendment made is read in the light of the history of the legislation on the subject, it seems to me clear, with all deference to the majority of the court, that the amendment cannot be construed to have the effect of converting a criminal offense into civil wrong, when the object of the amendment, as stated in the title to the act, was merely to give the defendant the right of appeal.

If the defendant was prosecuted criminally for violating section 3799, the right of appeal, including the right of trial by jury, was given him by sections 4106, 4107 of the Code of 1904; but if the proceeding against him to recover the fine was by civil warrant, under the provisions of sections 712 or 2939, there was no right of appeal, because the judgment against him, exclusive of interest, would not amount to as much as ten dollars. The object of the amendment to the section by the act approved March, 1904, was, as stated in the title of the act, to give the defendant the right of appeal from judgments in such cases; and the provision that the appeal should be tried as appeals in misdemeanor cases was to give the defendant the right of trial by jury. It seems to me clear that the language of section 712 shows that the civil remedy provided for by it was not to be exclusive but cumulative. It provides that where a fine without corporal punishment is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited by action of debt, or action on the case, or by motion. There can be no question that where the fine may be more than twenty dollars it may be recovered by

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Dissenting Opinion

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either indictment, presentment or information, or it may be recovered by an action of debt or an action on the case or by motion, for the statute so declares. Where the fine cannot be over twenty dollars, it can be recovered by civil warrant, or it can be recovered in a criminal proceeding before the justice. If not, then we have this anomalous condition of things, that where a fine is imposed in a misdemeanor case which cannot exceed twenty dollars, the justice has no criminal jurisdiction of the offence, unless the offender be first indicted or presented in court and the case certified to the justice, as provided by section 4106 of the Code. This manifestly cannot be so since a justice is given exclusive original jurisdiction of all misdemeanors, by that section, except in a few cases otherwise specially provided for. Sec. 4106.

The penalty imposed for the violation of sections 3799, 3805a, 3862, 3863 and 3865 cannot exceed five dollars. In only one of them (3805a) is the offence declared in terms to be a misdemeanor. No indictment can be made for the violation of either. If the view taken by the court be correct, the violator of section 3805a alone can be prosecuted criminally, and the fine imposed for violating the other four statutes can be recovered only by a civil warrant. A conclusion which leads to such results, it seems to me, must be erroneous.

I am of opinion that there is no error in the judgment of the circuit court of the city of Richmond, and that it should be affirmed.

HARRISON, J., concurs with BUCHANAN, J.

*Reversed.*

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Opinion.

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**Wytheville.**

## PUCKETT v. COMMONWEALTH.

June 13, 1907.

**1. CRIMINAL LAW—Sunday Laws—Violation by Employer and Employee.—**

Any person, whether employer or employee, who violates the provisions of the Sabbath laws as contained in section 3799 of the Code is amenable to the forfeiture thereby imposed. In other respects, this case is controlled by *Wells v. Commonwealth*, ante p. 834.

Error to a judgment of the Circuit Court of Henrico county.

*Reversed.*

The opinion states the case.

*Wyndham R. Meredith*, for the plaintiff in error.

*Robert Catlett*, Assistant to Attorney-General, for the commonwealth.

BY THE COURT.

By consent this case was heard with the case of *Wells v. Commonwealth*, and is controlled by the decision therein.

It is contended that upon a correct interpretation of section 3799 of Va. Code, 1904, the employer, Wells, is liable for the forfeiture prescribed for a violation of the section and not the employee, Puckett.

We are of opinion that the statute is not susceptible of that

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Dissenting Opinion.

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construction, but that *any person* who violates its provisions is amenable to the forfeiture imposed. But, for the reasons set forth in the opinion handed down at the present term in the former case, the judgment of the circuit court in this case must be reversed and the warrant quashed.

BUCHANAN, J., (dissenting):

For reasons given in the dissenting opinion in *Wells v. Commonwealth*, ante, p. 834, I dissent from the opinion of the court in this case; and in this dissent Judge Harrison concurs.

*Reversed.*



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Opinion.

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**Richmond.**GEORGE MIDGET *Alias* WILLIAM JOHNSON v. COMMONWEALTH.

November 13, 1907.

1. **BILLS OF EXCEPTION—When to be Signed—Appeal and Error.**—Bills of exception not signed at the term at which the opinions and judgments of the court excepted to were announced, or in the vacation of said court within thirty days thereafter, or at any time at which the parties by consent entered of record at said term had agreed they should be signed, but signed at a subsequent term of said court, are not taken according to the statute, and cannot be considered by this court.

Error to a judgment of the Corporation Court of the city of Alexandria.

*Writ of error dismissed.*

The opinion states the case.

*Howard W. Smith* and *R. D. Brumback*, for the plaintiff in error.

*Attorney-General Wm. A. Anderson*, for the commonwealth.

BY THE COURT.

This day came again the parties by counsel, and the court having maturely considered the motion of the commonwealth to dismiss the writ of error awarded in this case, and the answer of the defendant thereto, and it now appearing to the court that

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the several bills of exception of the plaintiff in error were not signed by the judge of the corporation court of the city of Alexandria at the term at which the opinions and judgment of said court to which exception is taken were announced, or in the vacation of said court within thirty days after the end of such term, or at a time at which the parties by consent entered of record at said term had agreed that they should be so signed, but were signed by the said judge at a subsequent term of said corporation court, the court is of opinion that the said writ of error was improvidently awarded.

It is therefore considered that the said writ of error be dismissed, and that the commonwealth recover of the plaintiff in error her costs by her about her defense herein expended. Which is ordered to be forthwith certified to the said corporation court of the city of Alexandria.

*Writ of error dismissed.*

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Opinion.

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**Richmond.**

## HILL v. SMITH, SERGEANT.

November 29, 1907.

1. ARREST WITHOUT WARRANT—*Subsequent Procedure*—"Suspicious Character"—*Habeas Corpus*.—An officer may, without a warrant, arrest one whom he has reasonable ground to suspect of having committed a felony. He should then take the prisoner before the proper officer, who should, without unnecessary delay, formulate a specific complaint in writing against the prisoner, informing him of the offense of which he stands accused; and upon this complaint, he may be lawfully held until the case is disposed of according to law, and, if cause be shown by the commonwealth, the hearing may be postponed a reasonable time, not exceeding ten days at one time, without his consent. But a person charged with no offense cannot be held in custody merely as a "suspicious character," and if so held, he may obtain his discharge on *Habeas Corpus*.

Original application for *Habeas Corpus*.*Prisoner Discharged.*

The opinion states the case.

*David Meade White*, for the petitioner.*Minitree Folkes*, for respondent.

KEITH, P., delivered the opinion of the court.

At a former day of this term, Claude Hill filed a petition before this court, stating that on November 19, 1907, he was

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arrested, and on the following day, to-wit: November 20, 1907, was taken before the police justice of the city of Richmond, and there, for the first time learned that he was charged with "being a suspicious character," and without a hearing, was committed to the jail of the city of Richmond by the police justice of said city. The petitioner states "that he has not committed any offense against the laws of the commonwealth of Virginia; that he has not violated any of the laws or statutes of the United States; and, therefore, prays that the commonwealth's writ of *habeas corpus* may issue, directed to the sergeant of the city of Richmond, commanding him to bring the prisoner before this court.

In accordance with that petition, a writ was issued, directed to the sergeant of the city of Richmond, and commanding him to bring before this court, immediately after the receipt of the writ, the body of Claude Hill, which was accordingly done.

From the return of the sergeant of the city of Richmond, it appears that Hill is detained by virtue of a *mittimus*, which is in the following words:

"City of Richmond, to-wit:

*"To the Keeper of the Jail of said City:*

"Receive into your jail and custody the body of Claude Hill, charged before me, on oath of F. M. Kraft, suspicious character, and him safely keep until the 30th day of November, 1907, when you are required to have him before me, or some other justice of the peace of said city, at the police justice's court, at 9:30 o'clock of said day, to be further examined on said charge and dealt with according to law; said examination being thus continued for material witnesses for the commonwealth.

"Given under my hand and seal, this 20th day of November, 1907.

(SEAL)

"JNO. J. CRUTCHFIELD, Police Justice."

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By section 8 of the bill of rights, constitution of Virginia, 1902, it is provided that, "no man shall be deprived of his life or liberty except by the law of the land or the judgment of his peers."

It was held by this court in *Muscoe's case*, 86 Va. 443, 10 S. E. 534, that a constable may, by virtue of his office, without warrant, arrest for felony, or upon reasonable suspicion of felony, or for misdemeanors committed in his presence, and take the accused before a magistrate; and that a police officer cannot be authorized by municipal ordinances to do more.

And so, a party may be arrested without a warrant upon suspicion of having committed a criminal offense. Bishop on Crim. Proc., Vol. 1, sec. 182. And where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, for being already in custody, there is no reason to issue a warrant for his apprehension; but a written complaint or information against the defendant, setting out his offense, is as necessary in such a case as in any other. Sec. 179.

In the *Matter of Arthur Henry*, before the New York Supreme Court, 29 Howard Prac. (N. Y.) 185, it is held, that where an officer arrests a prisoner for felony on telegraphic or other satisfactory dispatches, without warrant, it is his duty, equally as if the arrest had been made by warrant, to take the arrested party without any unnecessary delay before some officer, who can take such proofs as may be offered, or if the circumstances will justify it, hold him for further examination. If this is not done with reasonable diligence, the party arrested can apply for a *habeas corpus*, calling on the officer to show cause why he is detained. And on the return of the writ, the rule is that, where the arrest is upon suspicion and without warrant, proof must be given to show the suspicion to be well founded. If no such proof is offered, it is the duty of the officer to discharge the party. In the course of its opinion, the

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court said further that, "The rule is that a private person even may arrest a party, if a felony has in fact been committed, and there was reasonable ground of suspicion; but in the case of an officer, he is justified in making an arrest if no felony was in fact committed, if he acted upon information from another on which he had reason to rely. This is the well settled rule in the English courts, sanctioned and followed in this state in the case of *Holley v. Mix*, (N. Y.) 3 Wend. 350, 20 Am. Dec. 702."

It appears from the affidavits in this case that there had recently been committed within the city of Richmond a felony of the gravest nature. Acting upon information in his possession, the police officer arrested Claude Hill upon suspicion of being the perpetrator of this crime. Instead of charging him, however, with being suspected of this specific offense, he was arrested and is held merely as a suspicious character.

We are of opinion that it was proper for the officer to arrest the prisoner, if he had reasonable ground to suspect him of having committed a felony, or the felony to which allusion has already been made; and that, having arrested and taken him before the police justice under such circumstances, it became the duty of the police justice, without unnecessary delay, to formulate a specific complaint in writing against the prisoner, informing him of the offense with the commission of which he stands accused, upon which complaint the prisoner may lawfully be held until the case is disposed of according to law; and if cause be shown by the commonwealth, the hearing may be postponed for a reasonable time, not exceeding ten days at one time, without his consent. Va. Code (1904), sec. 3963. But it appearing that the course indicated has not been pursued in this instance, we are of opinion that the detention of the prisoner is unlawful. The distinction is broad between holding a prisoner because he is suspected of the commission of a specific offense for such reasonable time as enables the common-

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wealth to investigate his connection with it, and the proceeding in this case of holding him upon a warrant which merely charges that he is a suspicious character.

We are, for these reasons, of opinion that the return of the sergeant of the city of Richmond does not show that the prisoner is held in accordance with the law of the land, and that he is entitled to his discharge.

*Prisoner Discharged.*

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Syllabus.

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**Richmond.****FORBES AND OTHERS v. STATE COUNCIL OF VIRGINIA, JUNIOR  
ORDER UNITED AMERICAN MECHANICS.**

January 16, 1903.

Absent, Harrison, J.

1. **APPEAL AND ERROR—Jurisdiction of Court of Appeals—How Conferred.**—The jurisdiction of this court is limited, and is prescribed by the constitution of the state and the laws passed in pursuance thereof, and the burden is upon him who invokes its authority to establish its jurisdiction over the matter in controversy.
2. **APPEAL AND ERROR—Contempts—When no Writ of Error Lies.**—No writ of error lies from this court to a judgment of an inferior court imposing a fine upon a party to a suit for disobedience of its orders, and directing his imprisonment in jail in default of the payment of said fine. Such judgment is not within the purview of section 4053 or of any other section of the code. The theory seems to be that if the order disobeyed is erroneous, the parties affected should appeal. If it is right, it should be obeyed.
3. **APPEAL AND ERROR—Want of Jurisdiction—Expressions of Opinion—Contempt.**—Where no writ of error lies from this court to the judgment of an inferior court imposing a fine on a party for a contempt of its judgment, the decision of the trial court that the acts of such party amount to a contempt is final, and this court will not intimate any opinion upon the subject.
4. **APPEAL AND ERROR—Contempts—Fine—Imprisonment—Liberty—Constitution, Section 88.**—A judgment imposing a fine upon a party for a contempt of court and giving him a reasonable time within which to pay it, but providing that if it is not paid, he shall be imprisoned, does not involve "the life or liberty of any person," within the meaning of section 88 of the constitution. The judgment being for a fine from which the party may relieve himself, does not deprive the party of life or liberty.



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Opinion.

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Appeal from a decree of the Chancery Court of the city of Richmond, imposing a fine upon plaintiffs in error for contempt of court.

*Dismissed.*

The opinion states the case.

*Meredith & Cocke, Wm. L. Royal and B. D. White*, for the plaintiffs in error.

*S. A. Anderson and Christian & Christian*, for the commonwealth.

KEITH, P., delivered the opinion of the court.

The chancery court for the city of Richmond, in a cause therein pending, styled "*State Council of Virginia, Junior Order United American Mechanics of Virginia, v. National Council, Junior Order United American Mechanics of the United States of North America, and Others*," upon the petition of the plaintiffs, issued a rule on the 20th day of February, 1907, against J. W. Forbes and others, summoning them to appear before that court on the 13th day of March, 1907, to show cause why they should not be fined and imprisoned "for a contempt of this court in disobeying, disregarding, and evading the decree of this court rendered on the 21st day of July, 1904, as affirmed by the supreme court of appeals of Virginia and the supreme court of the United States."

This rule was continued from time to time until the 8th day of May, 1907, and on that day came the defendants named in said petition and rule, except W. W. Sawyer, as to whom the said rule had been theretofore dismissed; and the matter being fully heard upon the petition, the rule, the answer of the several defendants, and upon certain affidavits and the various orders and decrees of the court, it was adjudged that the parties

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were in contempt of court in disobeying its decree; and thereupon the chancery court of the city of Richmond, "desiring to compel obedience to said decree, doth adjudge, order and decree that the persons above named (against whom the rule was issued) be, and they hereby are, fined the sum of \$20 each; and the same shall be paid by them, respectively, to the clerk of this court within thirty-five days from this date, and, in default of such payment, each of said persons shall stand committed to the custody of the sheriff of this city, to remain in jail until said sums be paid by them, respectively."

To that order a writ of error and supersedeas was awarded by this court.

We are met at the threshold of the case by a motion to dismiss the writ of error as having been improvidently awarded; the contention on the part of the State Council, Junior Order of United American Mechanics of Virginia, being that for a contempt, which consists of disobedience of a lawful decree of a court by a party to the suit in which the decree was rendered, no writ of error lies from this court.

This court is one of limited jurisdiction, and the burden is upon him who invokes its authority to establish its jurisdiction over the matter in controversy. *Harman v. City of Lynchburg*, 33 Gratt. 37. Its jurisdiction is defined by the constitution of the state and the laws passed in pursuance thereof; and in that constitution and those laws must be found its warrant for the whole jurisdiction which it exercises. Laborious investigation, therefore, into the sources of the common law, would shed but a feeble light upon the subject under discussion. To the law, then, as it is written, we shall turn for a solution of the question before us.

Section 4053 of the code of 1904 provides that "to a judgment for a contempt of court, other than for the non-performance of, or disobedience to, a judgment, decree, or order, a writ of error shall lie to the Supreme Court of Appeals."

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The rule in this case was issued at the instance of the party who had prevailed in the litigation and obtained a decree in its favor. The petition upon which the rule was issued alleged that the defendants were disobeying the decree of the court. The judgment upon the rule finds them guilty of this offence. and enters judgment against them in order to compel obedience to the decree. The proceeding thus comes plainly within the fifth sub-division of section 3768 of the Code of 1904, which declares the cases in which courts and judges may punish summarily for contempt: "Disobedience or resistance of an officer of the court, juror, witness, or other person to any lawful process, judgment, decree, or order of the said court."

In support of the jurisdiction of the court plaintiffs in error rely upon the case of *Wells v. Commonwealth*, 21 Gratt. 500. In that case the circuit court of Bedford county issued a rule against Thorpe H. Nance, who was a party to a chancery suit in that court, and against H. H. Wells, his attorney, charging Nance with disobedience to its decree, and Wells with aiding, abetting and counseling him to disobey it. A judgment was entered against them by the circuit court of Bedford, by which they were sentenced to pay a fine of \$50 each and to be committed to jail for ten days. From that judgment no writ of error seems to have been taken by Nance, but Wells brought his case to this court, and Judge Anderson, delivering its opinion, said: "The first question which meets us in this case is as to the jurisdiction of this court to review the judgment or sentence of the circuit court complained of. The power to fine and imprison for contempt is incident to every court of record. The courts of necessity have the power of protecting the administration of justice with a promptitude calculated to meet the exigency of the particular case. \* \* \* And where it is not otherwise provided by statute 'the sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interference, to each respective court' "—citing in

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support of this proposition the language of Mr. Justice Blackstone approved by Judge Story in *Ex parte Kearney*, 7 Wheat. (U. S.) 38, 44, 5 L. Ed. 391. "A commitment for contempt," continues the learned judge, "is a commitment in execution; and the judgment of conviction, unless the power to supervise is given by statute, is not subject to review in any other court, not even upon a writ of *habeas corpus*"—citing Hurd on *Habeas Corpus*, p. 412.

The statute fixing the jurisdiction of this court in contempt cases was at the time of that decision identical with section 4053, as also was the statute which declared the cases in which contempts might be punished summarily. See Code 1860, p. 801. Judge Anderson then points out that the language of the last-mentioned statute is much more comprehensive than the act which gave at that time the writ of error, for that act refers only to such judgments for contempt as are designed to enforce performance or obedience to a decree, and not to punish for an offense. To all other judgments for contempt of court, except for nonperformance or disobedience of a judgment, decree, or order, a writ of error will lie.

Coming, then, to a consideration of the facts as they appeared in the case of *Wells v. Commonwealth*, it seems that the judgment complained of in that case was not one to compel the performance of or obedience to a decree, but one for the punishment of an offense; and it was, therefore, held that the writ of error had been properly awarded. It seems to be plain that if Nance, who was party to the suit and was charged with disobedience to a decree of the court, and punished for it, had applied for a writ of error, it would have been denied. It was granted to his counsel, for he was not charged with disobedience to the decree. He was not a party to the suit. It had not commanded him to do or to refrain from doing anything. He, therefore, could not have been guilty of an act of disobedience to the mandate of the court. The charge against him, for which

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he was punished, was that he counseled disobedience to the decree; and so the court maintained its jurisdiction, and held that, where counsel acts in good faith and demeans himself honestly, he is not responsible for an error of judgment, and the case was reversed.

The offense denounced by the fifth subdivision of section 3768 is "disobedience \* \* \* to any lawful process, judgment, decree or order," and the theory upon which section 4053 rests, in providing that a writ of error shall lie to this court to all judgments for contempt other than for the nonperformance of or disobedience to a judgment, decree, or order, seems to be that in such case the parties to the cause should either appeal from the judgment, decree, or order, if they felt aggrieved by it, or, if it was a lawful decree of order, it should be obeyed. It is true that in this view the statute fails to provide, it may be, for the very case of which plaintiffs in error complain. They concede, of course, for the purposes of their present contention, at least, the correctness of the decree with the violation of which they are charged; but they earnestly insist that they have been guilty of no act of disobedience to its requirements.

The chancery court was of opinion that the fact of disobedience was established, and entered its judgment imposing a fine upon them. We have not considered the evidence with a view to forming any opinion as to whether or not it is sufficient to support the judgment. If we have no jurisdiction to review it, it would be manifestly improper for us to intimate an opinion upon that subject.

Another contention is made by the plaintiffs in error, which rests upon the language of the constitution of 1902.

Article 6, section 88, in reference to the jurisdiction of this court, says in part: "Subject to such reasonable rules, as may be prescribed by law, as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this

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constitution, have appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of this state or of the United States, or involving the life or liberty of any person. \* \* \*”

Conceding, for the purposes of this case, that the constitution operates *ex proprio vigore*, without legislative action, to confer jurisdiction on this court in all cases involving the life or liberty of any person, we think the language of the constitution falls short of maintaining the position of plaintiffs in error. The judgment complained of does not deprive them of life or liberty. It imposes a fine, and they are given a reasonable time within which to pay it; and it is only in the event of their failure or refusal to pay it that they are to be committed to jail. The imprisonment, then, would be, not the direct result of the judgment of the court, which by its terms imposes a fine upon plaintiffs in error for their disobedience to a lawful decree of the court. The language of the constitution is not broad enough to cover the case before us. It applies to every judgment involving the life or liberty of any person, but by force of the very terms employed excludes from its operation judgments which do not by their own terms involve life or liberty.

We are of opinion that this court has no jurisdiction to review the judgment complained of, and the writ of error is therefore dismissed.

*Dismissed.*

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Syllabus.

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**Richmond.****DEVINE v. COMMONWEALTH.**

January 16, 1908.

1. **INTOXICATING LIQUORS—Sales to Several Persons—Election to Prosecute as to one—Evidence of effect on Others—Case at Bar.**—If, upon the trial of a warrant for selling liquor without a license to several persons, the commonwealth elects to prosecute for a sale to one only, it cannot upon that warrant prosecute the accused for selling to any other person, nor prove sales to others in aid of its proof that he was guilty of the offense for which he was being prosecuted; though it may show by others the effect produced upon them by drinking a beverage purchased by them of the accused and bearing the same brand as that for which he is being prosecuted. In the case at bar, the witnesses for the commonwealth were questioned as to sales made to them by the accused, but it is clear, under the facts and circumstances of the case, that the accused was not prejudiced thereby.
2. **INDICTMENT—Statute Containing Exception.**—If an exception to a statute is so incorporated with the enacting clause that the one cannot be read without the other, then the exception must be negatived in any indictment for a violation of the statute; but if the exception be in a substantive clause subsequent to the enacting clause, though in the same section, it is matter of defense to be shown by the defendant.
3. **INTOXICATING LIQUORS—License—Exception in Statute—Cider—Burden of Proof.**—Upon a charge of selling liquor without license in this state, it need not be denied that the liquor sold was pure apple cider, although that is an exception contained in the statute. If it is pure apple cider, that is a matter of defense and comes more properly from the defendant, who has the burden of proof on that question; the exception in the statute being in a substantive clause and not in the enacting clause.
4. **INTOXICATING LIQUORS—Cider—Case at Bar—Analysis—Samples.**—The preponderance of evidence in this case shows that the cider sold

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by the defendant did not contain a greater percentage of alcohol than is allowed by the statute, and he should have been acquitted. The guilt or innocence of the accused depended upon the amount of alcohol the cider contained, and, while the correctness of the analyses introduced in evidence is not questioned, there were ample opportunities for tampering with the samples analyzed by the commonwealth before the analysis was made, and the analysis was, therefore, of little probative value.

Error to a judgment of the Circuit Court of Mecklenburg county on a prosecution for selling liquor without a license.

*Reversed.*

The opinion states the case.

*W. E. Holmes*, for the plaintiff in error.

*Attorney-General Wm. A. Anderson*, for the commonwealth.

BUCHANAN, J., delivered the opinion of the court.

This is a prosecution by warrant against the defendant for selling ardent spirits, without having obtained a license therefor, to Jack Wallace, Walter Willis, and to other persons unknown.

Upon the calling of the case in the circuit court, to which it had been appealed, the accused moved the court to require the prosecuting attorney to elect for which of the offences charged in the warrant he would prosecute, and he elected to prosecute for the sale alleged to have been made to Jack Wallace.

The commonwealth introduced evidence that the accused, who was a merchant in Chase City, had been selling at his place of business to the public, for about two years prior to November 1, 1906, cider known as "Manhattan," without a license; that in January and August or September of that year he had sold cider to Jack Wallace; that the cider purchased by him in



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January, of which he drank a considerable quantity, made and kept him drunk for two days, but the latter purchase, which was less in quantity, did not make him drunk. It was also proved that country cider would produce intoxication if drank in large quantities.

The commonwealth then offered to prove by J. H. Wallace that the accused had sold him cider which made him drunk. The defendant objected to that evidence upon the ground that he was being tried upon the charge of selling to Jack Wallace alone, and that evidence to prove that he had sold to any other person, or on any other occasion, was inadmissible. The court overruled the objection and permitted the evidence to go to the jury, to show that the article sold produced intoxication. This action of the court is assigned as error.

The commonwealth, having elected to prosecute the accused for selling to Jack Wallace, could not under the warrant upon which he was being tried, prosecute him for selling to any other person; nor could it prove that he had made sales to other persons in aid of its proof that the accused was guilty of the offence for which he was being prosecuted. See *Hatcher & Shaw's Case*, 106 Va. 827, 55 S. E. 667; *Cole v. Commonwealth*, 5 Gratt. 696; *Walker v. Commonwealth*, 1 Leigh 574; 1 Bish. New Cr. Pr., secs. 1120-1124; 2 Whart. Cr. L., sec. 1524-1525; *Pearce v. State*, 40 Ala. 720.

The court did not admit the evidence of the sale to J. H. Wallace for either of those objects, but solely for the purpose of showing that the cider sold to the witness, which the evidence tended to prove was the same kind of cider as that sold to Jack Wallace, would produce intoxication, and was, therefore, ardent spirits within the meaning of the statute. The commonwealth had already shown, without objection so far as the record shows, that the accused had been selling cider known and called "Manhattan" for about two years to the public generally, at his store. There was no question that the accused had made the sales testi-

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fied to by Jack Wallace—but his defence was, that the cider sold was such as he had the right to sell without a liquor dealer's license. The character of the cider sold and not the fact of the sale to Jack Wallace being the controverted question in the case, evidence by those who had drank it, showing what effect it had upon them, was clearly admissible; and while it would, perhaps, have been better to have asked such witnesses what effect it had upon them, without proving that the accused had sold it to them, it is clear under the facts and circumstances of the case, that the evidence of the sale to J. H. Wallace did not prejudice the accused.

The next question to be considered is whether or not the court erred in instructing the jury that the burden of proof was on the accused to show that the cider sold by him to Jack Wallace was such as the accused had the right to sell without a liquor dealer's license.

By section 141 of an Act of Assembly, approved February, 1904, (Acts of Assembly, 1904, ch. 20, pp. 42-3), it is provided that "No person, corporation, firm, partnership or association shall, within the limits of this state \* \* \* sell or offer to sell by sample, representatives or otherwise, wine, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruits preserved in ardent spirits, either by wholesale or retail, or to be drunk at the place where sold, or in any way, without first having obtained license therefor; nor shall the license confer the privilege of selling in any way, except in the manner hereinafter provided. And all mixtures, preparations and liquids (except pure apple cider), which will produce intoxication shall be deemed ardent spirits within the meaning this act."

By an Act approved March 14, 1906, (Acts 1906, ch. 181) entitled "An Act to define what is pure cider within the meaning of section 141 of chapter 20 of acts 1904, approved February 19, 1904," it is provided, that pure apple cider as mentioned in

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that section, and other sections, "shall be construed to mean the pure juice of the fruit used without admixture whatever except preservatives, and not to contain more than seven and one-half *per cent.* of alcohol."

Under the authorities, if this were a prosecution by indictment, it would not be necessary in the indictment to allege that the ardent spirits charged to have been sold was not pure apple cider, as defined by the statute.

In *Commonwealth v. Hill*, 5 Gratt. 682, the accused was indicted for selling without a license, by retail, wine, rum, brandy and mixtures thereof, not to be drank at the place where sold, against the statute, &c. He demurred to the indictment because it contained no averment that the liquors charged to have been retailed without a license had not been actually made from the produce of the defendant's own estate or distilled by him, or those in his own employ. In holding that such an averment was not necessary, Judge Lomax, who delivered the opinion of the general court, said, that the offence was created by the third section of the act, which he had quoted, which provided "that any person, other than such as are *thereinafter* excepted, who shall otherwise than as *thereinafter* expressly provided sell, etc., is subjected to the penalty. What these exceptions and provisos are, will be found in the fourth section, and among them is that of a person selling liquors actually made from the produce of his own estate, etc. It cannot, consistently with any authority which we have met with, be contended that the terms of such enactment as the above have so incorporated the exceptions with the enactments as to require the negative of the exception as an essential element in the indictment, and not to make the matter of the indictment a part of the defense. The rule of law seems to be directly opposed to any such pretension. It is laid down in regard to this doctrine in 1 Chitty Cr. Law, 283, that, when a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment

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that the defendant does not come within the exceptions, or to negative the provisos which it contains." Citing several English cases. "Nor," he continues, "is it even necessary to allege that he is not within the benefit of the provisos, though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in cases thereafter excepted. \* \* \* For all these are matters of defence, which the prosecutor need not anticipate, but which are more properly to come from the prisoner."

In *Commonwealth v. Hart*, 11 Cush. (Mass.) 130, a case for selling intoxicating liquors, where the sale of cider for some purposes was excepted, the indictment was sustained, although the exception was not negatived; the court holding that, where there is an exception so incorporated with the enacting clause of a statute, that the one cannot be read without the other, then the exception must be negatived; but if the exception, by whatever phraseology indicated, is in a substantive clause subsequent to the enacting clause, though it be in the same section, it is a matter of defense to be shown by the defendant. See note to last case in 2 Lead. Cr. Cases, pp. 7 to 18; *State v. Abbey*, 29 Vt. 60, 66, 67 Am. Dec. 764; *Keith v. State*, 91 Ala. 2, 8 South. 353, 10 L. R. A. 430; 1 Bish. New Cr. Pro. 631-646.

The exception in the statute under consideration is not so incorporated in the enacting clause that one cannot be read without the other. While in the same section, it is in a substantive clause defining what shall constitute ardent spirits within the meaning of the statute. If the commonwealth would not be required to negative the exception in its pleading, it would not of course be required to prove that the cider sold by the accused was not pure cider within the meaning of the statute, but that would be a matter of defense.

The refusal of the court to set aside the verdict because contrary to the evidence, is also assigned as error.

The evidence was clearly sufficient to show that the accused

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had sold cider to Jack Wallace after section 141 of the revenue law had been amended by the Act of Assembly approved March 14, 1906, which would and did produce intoxication. But the defendant proved that he purchased the cider sold by him from E. A. Saunders, & Co., wholesale dealers in cider, whiskeys, and other articles, of the city of Richmond, who, through their salesman, represented to and assured the defendant at the time of the purchase, that the same was pure apple cider, and showed him a card, dated January 24, 1906, signed by the internal revenue collector of the United States for the second district of Virginia, that, upon an analysis made of samples of that brand of cider, the samples were shown to have the composition of pure apple cider made from the juice of apples. The defendant also introduced in evidence an analysis of the same brand of cider made in June, 1906, by Froehling & Robertson, analytical chemists, of the city of Richmond, showing that the cider contained of alcohol 5.09 *per cent.* by weight, and 6.35 *per cent.* by volume, and was pure apple cider sweetened with sugar. The commonwealth introduced in evidence an analysis of the same brand of cider, made by the chief chemist of the State Agricultural Department, which showed that the sample furnished contained of alcohol by weight 7.84 *per cent.*, and by volume 9.75 *per cent.*, and seemed to be a mixture of apple cider and grape wine sweetened with sugar. But the analysis introduced by the commonwealth was made under circumstances which rendered it of little value in determining the character of the cider sold by the defendant. It appears that in November, 1906, the town sergeant of Chase City obtained from the defendant three half-gallon bottles of the cider sold by him; that these bottles were turned over to the mayor of the town, who locked them up in a room adjoining his office, where he left the key, to which key and room his bookkeeper had access; that they remained there several weeks, when, about the date of the December term next of the circuit court for that county they were returned to the

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town sergeant, who brought them to Boydton, the county seat, and afterwards delivered them to one C. Haskins, whose mother kept the Exchange Hotel at Boydton, where, for three or four weeks, the bottles remained in the hotel office, where any one who desired could have access to them, and that they were handled and opened by persons in said office, though the clerk of the hotel had not seen any one put anything into them; and that after this, they were sent, at the request of the mayor of Chase City, to the Agricultural Department for analysis.

There was, under these circumstances, ample opportunity for the samples of cider obtained by the town sergeant from the defendant to have been tampered with before the analysis was made. The fact that such analysis showed that the sample furnished the state chemist seemed to be a mixture of apple cider and grape wine, and in that respect different from the samples analyzed by the other chemist, would tend strongly to show that it had been tampered with. The correctness of the analyses introduced in evidence is not questioned. Their value, therefore, as evidence does not depend upon the credibility of the persons who made them, but upon the circumstances under which they were made; and while the analysis made at the instance of the commonwealth was perhaps admissible in evidence, it was made under circumstances which give it little probative value.

It seems to us, therefore, that the defendant showed by a preponderance of evidence that the cider sold by him did not contain more than seven and one-half *per cent.* of alcohol, and upon this ground was entitled to a verdict in his favor, and that the circuit court erred in not so holding.

We are of opinion to reverse the judgment complained of, set aside the verdict, and remand the cause to the circuit court for a new trial.

*Reversed.*

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**Richmond.****FIELDS v. COMMONWEALTH.**

January 16, 1908.

1. **CRIMINAL LAW—New Trial—Insufficient Evidence—Conduct of Detective.**—The evidence in this case is palpably insufficient to support the verdict of conviction which was found. It consists solely of the testimony of one witness, who admitted his perjury in the case, and of an amateur detective, whose story furnishes internal evidence of the fact that it was a sheer fabrication, and who resorted to methods so flagrantly reprehensible as to bring reproach upon the administration of justice if they were sanctioned.

Error to a judgment of the Circuit Court of Brunswick county.

*Reversed.*

The opinion states the case.

*Turnbull & Smithey* and *Wm. B. Cocke*, for the plaintiff in error.

*Robert Catlett*, Assistant to Attorney-General, and *E. P. Buford*, for the commonwealth.

WHITTLE, J., delivered the opinion of the court.

The accused, Thomas Fields, brings this writ of error to a judgment of the circuit court of Brunswick county, whereby he was convicted of malicious wounding, and sentenced to five years' confinement in the penitentiary.

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Though irregularities occurred during the trial which were highly prejudicial to the prisoner, and which were made the grounds of exception, we need only notice the assignment of error involving the ruling of the court with respect to the motion to set aside the verdict of the jury as contrary to the evidence.

The sole testimony tending to implicate the accused with the commission of the crime charged was that of an amateur detective, Reams, who came from an adjoining county to work up the case, and his confederate, Brackett.

The substance of Reams' story is that he suspected the accused of complicity with the offense from his reputation, and that his suspicion likewise attached to Brackett. Consequently he went in the night time to the home of the prisoner, "and hid himself in the front yard. After dark, some one came out of the house to get wood, and spoke a few words to some one in the room." He had never seen the prisoner, but presumed that he was the man who came out of the house, though he admitted that he could not see his face, as his back was toward the light. The following day he approached Brackett and told him that "he had the dead wood on him and Thomas Fields, and that he, Brackett, had better admit their guilt," promising to see that "it would not go hard with him if he did so." Accordingly Brackett confessed that "he and Thomas Fields went by Mattie Massenburg's \* \* \* and Thomas Fields committed the act, and that he tried to persuade him not to do it; that the prisoner looked in the window, and seeing Arthur Crichton, said he was going to shoot or kill him, and threw a rock at him through the window, and then threw another rock and drew his pistol and shot into the room several times." Reams further testified that he thereupon entered into an arrangement with Brackett that the latter should accompany the accused along a certain road after night-fall and engage him in conversation, so that witness might hear his statements. This conspiracy was carried out shortly thereafter; and, though the night was dark, Reams



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asserted that he identified the accused (whom he said he had only seen on the former occasion and under the circumstances mentioned), and heard him admit to Brackett, among other things, that he struck Crichton and intended to kill him. Brackett testified that he was greatly alarmed by Reams' accusation, and, in order to shield himself from what he thought would be certain punishment, told Reams that the accused had committed the offence, but he positively denied being a party to any agreement that he should induce the prisoner to go with him, as alleged, for the purpose of extracting a confession from him, or that any such occurrence ever happened. While the witness did not deny that, on the preliminary trial before the justice, he might have made the statement attributed to him inculcating the accused (for he was intoxicated and did not remember what he said), he, nevertheless, declared that "it was a lie made from whole cloth."

Reams' own version of the matter shows that it was not possible for him to have identified the accused on the occasion of the alleged confession. He fixed the occurrence on a dark night, in order that he might eavesdrop without being detected, and recklessly swore that under such conditions he could positively identify a man whom he was not certain he had ever seen before; and, if he had, it was in the night time, with a light falling upon him from behind in such manner that he could not discern his features.

It is almost equally as incredible that the accused should have confessed his guilt to Brackett, who, according to the theory of the prosecution, was present when the assault was made, was fully cognizant of all the details attending its commission, and endeavored to prevent it. Of course, no credence can be given to the self-acknowledged perjury of Brackett; and, with the testimony of these two witnesses eliminated, there is absolutely no evidence upon which to rest a verdict. The flimsy tale of

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the witness Reams furnishes internal evidence of the fact that it was a sheer fabrication.

Our conclusion is that the evidence is not only palpably insufficient to warrant the verdict, but that the methods resorted to by Reams were, under the circumstances, so flagrantly reprehensible that to sanction them would tend to bring reproach upon the administration of justice.

For these reasons the judgment must be reversed, and the case remanded for further proceedings.

*Reversed.*

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Syllabus.

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**Richmond.**

HANGER v. COMMONWEALTH.

AND

CRAWFORD SOCIAL CLUB, INC., v. COMMONWEALTH.

January 16, 1908.

1. **APPEAL AND ERROR—Jurisdiction of Trial Court—Sunday Law—Forfeiture—How Recovered.**—The forfeiture prescribed by section 3799 of the code for a violation of the Sunday law can be recovered by civil warrant only, and the objection that the procedure was by a criminal warrant instead of a civil warrant, may be raised in this court for the first time. The question of jurisdiction of the subject matter of litigation is an open one in every case until the case is finally disposed of.
2. **APPEAL AND ERROR.—Correct Verdict—Ruling on Instructions.**—Where it plainly appears that the verdict of the jury could not have been other than it was, this court will not consider the ruling of the trial court in granting or refusing instructions.
3. **SOCIAL CLUBS—Incorporation—Unlawful Business.**—Social clubs authorized to be chartered under the statutes of this state are manifestly intended to be purely social. It was clearly never intended to confer upon such organizations authority to conduct a business which an individual cannot lawfully conduct. A charter of incorporation may be granted by the State Corporation Commission to an association to conduct any business that an individual may lawfully conduct, but never to conduct a business which an individual may not lawfully conduct under existing laws.
4. **SOCIAL CLUBS—Incorporation—Fraudulent Purpose—Violation of Sunday Laws.**—The evidence in this case shows that the object in obtaining a charter for a social club and the pretended organization thereunder was for the fraudulent purpose, on the part of the incorporators, of securing the privilege of selling tobacco, cigars, cigarettes, soda water and other soft drinks on Sunday—a privilege which they could not exercise as individuals without violating existing statutes—and the charter of said pretended social club was therefore properly vacated and annulled.

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Error to judgments of the Hustings Court of the city of Portsmouth. To a judgment of conviction under a criminal warrant, Hanger assigns error. To a judgment annulling the charter of the Crawford Social Club, it assigns error.

*Prosecution against Hanger Dismissed.*

*Judgment against Crawford Social Club Affirmed.*

The opinion states the case.

*Thos. H. Willcox and R. H. Bagby, for Hanger.*

*R. H. Bagby, for Crawford Social Club.*

*Robert Catlett, Assistant to Attorney-General, and W. H. Stewart, for the commonwealth.*

CARDWELL, J., delivered the opinion of the court.

It may be said that these are companion cases. They were argued together here, and will be disposed of in this opinion in the order named.

The plaintiff in error, S. T. Hanger, in the first-named case, complains of a judgment in the lower court, affirming a judgment rendered by the mayor of the city of Portsmouth, whereby he was fined \$2.00 for personal violation of section 3799, known as the "Sunday Law," and \$2.00 each for two servants employed by him at work on the same day.

Section 3799 of the Code, *supra*, was construed by this court in the recent case of *Wells v. Commonwealth*, *ante*, p. 834, 1 Va. App. 211, 57 S. E. 588, where it is held, that the forfeiture prescribed for a breach of the statute cannot be recovered by a criminal warrant, but must be by civil warrant. We are met,

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therefore, at the threshold of this case with the question of jurisdiction.

It is argued for the commonwealth that, as no objection was made in the trial court to the form and nature of the proceedings, plaintiff in error is precluded from making that objection here; but, as was said by Buchanan, J., in *Southern & Western R. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824, citing a number of authorities: "To hold that the question of the jurisdiction of the trial court could not be made in the appellate court for the first time, would be in effect to hold that consent could give jurisdiction and might result in the affirmance of a judgment which the trial court had no authority to enter."

Among the authorities cited is *Jones & Ford v. Anderson*, 7 Leigh 308, 314, where it is said: "It must always be *ex officio* the duty of a court to disclaim a jurisdiction which it is not entitled to exercise. To do otherwise would be to usurp a power not conferred by law."

See also *Furst v. Banks*, 101 Va. 208, 43 S. E. 360; and *Wayt v. Glasgow*, 106 Va. 120, 55 S. E. 536, where it is said that the question of jurisdiction is an open question in every case until the case is finally disposed of.

It follows that the judgment in this case must be reversed; and this court will enter such judgment as the Hustings Court for the city of Portsmouth should have entered, dismissing the prosecution.

The writ of error in the second case is to a judgment of the Hustings Court for the city of Portsmouth, annulling the charter of the plaintiff in error obtained from the State Corporation Commission, pursuant to its authority to grant charters to organizations known as social clubs.

The proceedings were had upon a writ of *quo warranto*, issued by the lower court upon a petition filed by the attorney for the commonwealth for the city of Portsmouth; the grounds stated upon which the said charter was asked to be annulled

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revoked and vacated being, (1) misuse of the corporate privileges and franchises conferred by the charter; (2) for the exercise of a privilege and franchise not conferred by law; and (3) because the charter of incorporation was obtained for a fraudulent purpose, and for a purpose not authorized by law.

The judgment complained of was rendered upon the verdict of a jury finding the facts to be as charged in the petition for the writ of *quo warranto*; and plaintiff in error relies upon two assignments of error for a reversal of the judgment—first, misdirection of the jury; and, second, the refusal of the trial court to set aside the jury's verdict as contrary to the law and the evidence.

As we view the case, it is needless to consider the instructions given or refused, since it appears plainly from the evidence that no other verdict could have been rendered thereon than that rendered by the jury. *Interstate &c. Co. v. Clintwood &c. Co.*, 105 Va. 374, 54 S. E. 593; *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862; *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364, 99 Am. St. Rep. 865; *Richmond Pass. &c. Co. v. Steger*, 101 Va. 319, 43 S. E. 612.

The law authorizing the chartering of social clubs is found in ch. 4 of the "Act concerning corporations," Acts 1902-3-4, p. 461; and while the act does not define the functions that may be exercised by such corporations, and there is no general law describing the character of the business that may be done, or regulating the conduct of corporations of this nature, it was clearly never intended to confer upon the organization authority to conduct a business which, if conducted by an individual, would be in violation of law. A charter of incorporation may be granted to an association of persons to conduct any business that an individual may lawfully conduct under the laws of the state (*Ward L. Co. v. Henderson-White Mfg. Co.*, ante p. 626, 59 S. E. 476, recently decided by this court), but never to au-

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thorize the conduct of a business which an individual may not lawfully conduct under existing laws.

The functions of social clubs, authorized to be created by the statute, *supra*, manifestly are intended to be purely social; otherwise, it would have been needless to enact ch. 4 of the act. *supra*, separate and in addition to ch. 1 of the same act, which provides for the incorporation of stock companies for general business purposes.

The purposes for which plaintiff in error was organized, as shown by its certificate of incorporation, are as follows:

"Social fellowship and companionship among its members, promoted by intercourse and contact with each other, and to this end to furnish a place where meetings may be held, where questions of the day may be discussed, and innocent amusements engaged in, with the privileges of providing and furnishing, at any and all times, to its members, for pay, diet and refreshments of any and all kinds; cigars, cigarettes and tobacco; and any and all such drinks as are commonly known as soft drinks, such as soda waters, mineral waters, ginger ale and all other drinks except wines, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, or bitters containing alcohol, which are hereby prohibited. And with the further privilege of providing and furnishing, at any and all times, to its members, for pay, such other articles and things and such services as they may desire."

Every purpose declared and every right and privilege conferred by the charter, is conferred on members of the club; therefore, it was clearly intended to be a *social club*, and not a business corporation.

The evidence in the case conclusively shows that the Hanger Drug Co., of the city of Portsmouth, prior to the organization of plaintiff in error, had habitually violated the "Sunday Law," *supra*; that on the 3rd of May, 1906, the Hanger Drug Co., or S. T. Hanger, its president, was notified by the chief of

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police, under orders from the mayor, that the law against selling on Sunday would be enforced; that on Sunday, May 6, 1906, following this notice, the Hanger Drug Co. strictly observed the "Sunday Law," and made no sales of tobacco, soda water, etc.; that on May 9, 1906, the said S. T. Hanger, J. T. Jarrett and L. B. Whatley made the certificate of incorporation for obtaining the charter of plaintiff in error; that the said S. T. Hanger was the president of the Hanger Drug Co., the said J. T. Jarrett a stockholder in the company, and the said L. B. Whatley, a clerk in its employ; that on the 11th day of May, 1906, the following advertisement appeared in the *Portsmouth Star*, a newspaper published in the city of Portsmouth:

**"THE CRAWFORD SOCIAL CLUB**

will be open for membership Friday, 8 P. M., and the club's charter entitles its members to harmless entertainment and refreshments, for pay, at any and all times, such as soft drinks, cigars, tobaccos, confections, newspapers, etc.

"There is no initiation fee. There are no dues. You express your desire to become a member by signing an application and the officers issue you a membership certificate. Apply to

**"HANGER'S PHARMACY,**

**"Portsmouth, Va."**

On the 12th day of May, 1906, an agreement of lease between the Hanger Drug Co. and plaintiff in error was entered into, whereby the latter was to have the use of the rear room of the building (occupied by the Drug Co.) as a place of meeting for its members, and to have the privilege of running the soda fountain and supplies, the use of the tobacco, cigars and cigarette stand and accessories, and also the candy and confectionary stand, etc., the Hanger Drug Co. to keep "the soda fountain and stands fully supplied for the use of the members of the



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club, and furnish the same as they may desire;" and in consideration of a compliance with the covenants of the agreement on the part of the Hanger Drug Co., it was to have ninety *per cent.* of the gross receipts from all sales made to members of the club.

On the next day after this agreement was entered into, which was Sunday, May 13, 1906, the store of the Drug Co. was opened, and the said S. T. Hanger and his usual employees were engaged in selling the articles mentioned in the agreement of lease, and every day thereafter the store was opened, including Sundays, and tobacco, cigars, cigarettes, soda water, etc., sold by employees of the Drug Co., or of plaintiff in error, to the general public on week days, but only to the so-called members of the club on Sundays. The most inadequate provision was made for the "association" of the members of the club, and no meetings of the general membership thereof were ever held, and only occasional meetings were held by the directors. S. T. Hanger being the president of both the "Crawford Social Club" and the Hanger Drug Co., and practically the owner of the latter's business, the direction and control of the affairs of the club, as well as the business of the Drug Co., was in the hands of Hanger and his employees. To become a member of the club, it was necessary only to sign an application and receive a membership certificate. With this certificate in his possession, the holder could buy in the open store of the Drug Co., on Sunday, cigars, cigarettes, tobacco, any and all such drinks as are commonly known as soft drinks, and all other drinks, except wines, etc., sold to any and all persons at the store on week days; and practically no other use is made of the certificate or membership in the club.

Upon the foregoing facts, it too plainly appears to admit of discussion, that the obtaining of the charter in question and the pretended organization of a *social club* thereunder was for the fraudulent purpose of securing the privilege of selling to

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bacco, cigars, cigarettes, soda-water, and other soft drinks on Sunday—a privilege which an individual could not exercise without incurring the forfeiture prescribed in section 3799 of the code, *supra*.

Doubtless social clubs are generally regarded, in morals and in law, as free from condemnation and even censure, when organized in good faith, and conducted in accordance with what was intended by the lawmaking power of the state in authorizing their incorporation; but where it is made to appear, as in this case, that the charter of such an organization was fraudulently obtained, or was being used for the fraudulent purpose of conducting a *business* which an individual may not lawfully conduct in this state, or as a cloak to shield an individual or a corporation from punishment for the violation of existing statutes, enacted for the good order and welfare of our people, not only should the punishment prescribed by the statute for such an offence be imposed, but the charter of the offending so-called social club be annulled and vacated. It would be a reproach to the courts of the state were they to sanction or let go unpunished violations of our police regulations by an incorporated social club or organization, for which an individual could not escape punishment. The statutes authorizing the incorporation of social clubs have no such power in view.

That an affirmance of the judgment in this case, as argued by counsel for plaintiff in error, would be to declare that all social clubs in this state are being conducted in violation of our statutes, and their charters void, is a *non sequitur*. In any case where, as in this, it is made clearly to appear that the charter of such a club was fraudulently obtained, or is being abused by its use to shield individuals or an incorporated company from punishment for violating the laws of the land, or otherwise, such a charter, in a proper proceeding for that purpose, should and doubtless would be adjudged null and void.

We are not called upon here to declare what would and what

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would not be an abuse of its charter by a social club, as that question has to be determined upon the facts of the particular case. In the case before us, as already observed, the proof leaves no room to doubt that the charter in question was obtained and was being used as a mere make-shift to enable the practical owner and proprietor of the Hanger Drug Co. to do, under the cloak of the charter, that which an individual could not do and escape punishment.

The judgment of the lower court, annulling and vacating the charter of the plaintiff in error, is plainly right, and will be affirmed.

*Case No. 1, Dismissed.*

*Case No. 2, Affirmed.*

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Syllabus.

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**Richmond.**

RICHARDS v. COMMONWEALTH.

January 16, 1908.

1. CRIMINAL LAW—*Jurors from Another County—Case at Bar.*—While the action of the trial court in directing a jury to be summoned from another county in a criminal case will not be reversed unless it is plain that it has improperly exercised the discretion vested in it, still one accused of crime is guaranteed by the constitution and laws of the state a trial by a jury of his vicinage, and it must be made to appear in some manner that it is reasonably necessary to send to another county for a jury in order to obtain qualified jurors. The evidence in this case does not show that it would have been inconvenient, within any reasonable meaning of that word, to have obtained a jury in the county in which the alleged offence was committed.
2. EVIDENCE—*Opinions of Non-Experts—Impressions.*—A witness must, as a rule, state facts and not his opinions, but, if the constituent facts cannot be fully placed before the jury, a witness who has had adequate opportunity for observation may, after enumerating such of the constituent facts as he can, state the effect on his mind of the numerous phenomena which constitute the impression of appearance, whether of animate or inanimate objects, as that a substance which he had seen and examined was grease, or that a mustache worn by a man was a false mustache, or that a bottle found near the place of a homicide was the same previously seen in the possession of the accused.
3. EVIDENCE—*Admissibility—Unrelated Facts—Res Gestae—Dying Declarations.*—On a trial of a prisoner for the murder of a man who was shot while driving along a public road in his buggy, the statements of the deceased when in a dying condition that a third person, on his invitation, got into his buggy and rode with him, but left it before and beyond where he was shot, are not admissible in evidence either as a part of the *res gestae* or as a dying declaration. They are not so connected with the fact under investigation as to constitute part of it, nor do they relate to the cause of the death of the deceased nor to the circumstances leading up to it.

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4. EVIDENCE—*Cross-Examination of Witness*.—No prejudice results to a prisoner from refusing to allow him to cross-examine a witness on matters not brought out in his examination in chief, where the witness is subsequently put on the stand by the court as its witness and the defendant is allowed to cross-examine him on the matters previously excluded.
5. EVIDENCE—*Experiments*.—In order to show by experiment that a prisoner's shoe made a track shorter than his shoe, the experiment must have been made under the same or substantially similar conditions to those which existed at the time the tracks were made.
6. EVIDENCE—*Impeachment of Witness—Judge's Notes*.—The judge's notes taken at a former trial of a case, however full they may be, are not receivable to contradict a witness, because not taken in the discharge of any official duty, but merely for his own private convenience.
7. INSTRUCTIONS—*Jury Fully Instructed—Refusing Other Correct Instructions*.—When the instructions given fully and fairly submit the case to the jury, it is not error to refuse to give other instructions tendered, although they may contain correct statements of the law as applied to the case.

Error to a judgment of the Circuit Court of Floyd county.

*Reversed.*

The opinion states the case.

*Scott & Buchanan, V. M. Sowder, B. H. Custer and Howard & Howard, for the plaintiff in error.*

*Attorney-General William A. Anderson, for the commonwealth.*

BUCHANAN, J., delivered the opinion of the court.

The first error assigned by the prisoner is to the action of the circuit court in ordering the *venire* for his trial to be summoned from a county other than that in which the offence was alleged to have been committed and the accused was tried.

The bill of exception taken to this action of the court shows

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that the order was made upon the motion of the commonwealth over the prisoner's objection, without any evidence except "the record" in the cause.

The authority for summoning a jury from another county or corporation is found in section 4024 of the Code, and is as follows: "In any criminal case in any court, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many of such jurors as may be necessary to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer."

The contention of the accused is that, under the constitution and laws of the commonwealth, he had the right to be tried by a jury of the county where the crime he was charged with, was alleged to have been committed, where he was indicted and tried, and in which he himself and the principal witnesses for and against him resided; that he could not be tried by a jury from another county or corporation unless qualified jurors could not be conveniently found in his own county; and that "the record" upon which the court based its opinion that qualified jurors could not be conveniently found in his county, wholly fails to show that fact.

As before stated, the commonwealth, to sustain its motion to have a jury summoned from another county, introduced no evidence, and relied solely, as did the court in sustaining the motion, upon what appeared "from the record in the cause." "The record" shows that the accused was indicted for murder at the October term, 1905, of the court. His trial commenced on the 17th, and on the 30th of the month the jury were discharged because they were unable to agree upon a verdict, and **the cause continued.**

charged because they were unable to agree upon a verdict, and

In selecting the panel of sixteen persons, from which the jury at that trial was taken, eight were found free from exception among the sixteen persons summoned for the trial of an-

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other person accused of a felony and the other causes to be tried at that term of the court. The court then directed twelve other persons to be summoned from a list furnished by it. Of those eleven were summoned, eight of whom were sworn, examined and found free from exception, and the panel completed.

By consent, the cause was continued at the next February term of the court. At that term the court ordered that the names of thirty-six persons be drawn from the jury box. Of these, the sheriff was directed to summon thirty-two for the next (April) term of the court. Thirty-one of these were summoned, and of them six were found free from exception. To complete the panel, seventeen persons were summoned from a list of twenty-two furnished by the court. Of these, ten appeared, all of whom were found free from exception, and the panel of sixteen secured. At that trial, which continued from the 17th to the 28th day of April, the jury, being unable to agree, were discharged, and the cause continued. At the next (July) term of the court, the order complained of, directing a jury to be summoned from Patrick county for the October term of the court, was entered. These are all the facts which "the record" disclosed as to the necessity of summoning a jury from another county.

The question of the propriety of summoning a foreign jury, under the provisions of section 4024 of the code, although in substance enacted more than fifty years ago, has seldom been raised in this court. The rule, however, which should govern us in passing upon the question is well settled, and is stated by Judge Moncure in *Chahoon's Case*, 21 Gratt. 822, 833, as follows: "In the exercise of the power conferred by this law, the court of trial must, of necessity, have a great deal of discretion, and the appellate court, in revising the judgment, ought not to reverse it for error in this respect, unless it be plain that such discretion has been improperly used." See also *Page's Case*, 27 Gratt. 954.

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Upon the former trials, there was comparatively little difficulty in finding qualified jurors. Upon the first trial, one-half of those summoned, whose names had been drawn from the jury box for the trial of another person charged with a felony, were found free from exception. The remaining eight required to complete the panel of sixteen were obtained from eleven persons summoned from the list furnished by the court. Upon the second trial, only about one-fifth of the thirty-one summoned, whose names were drawn from the jury box, were found to be qualified jurors; but the remaining ten required to complete the panel of sixteen were obtained from the seventeen persons summoned from the list of names furnished by the court. It would seem from the order of the court that these ten jurors were all that appeared or that were examined from the seventeen summoned. The order states, that "ten of the persons summoned from said *venire facias* from the said list furnished by the court appearing in court, to-wit," and after giving their names the order, continues, "who were sworn and examined by the court, found free from all legal exception, and qualified to serve as jurors." In none of the cases which have come to this court in which this question was involved was a jury summoned from another county upon so little evidence of the necessity or propriety of such action.

In *Wormley's Case*, 10 Gratt. 658, there were affidavits that at a former trial, between three and four hundred persons had been summoned for the trial of the accused, and another who was jointly indicted with him, in order to get a panel for his trial; and that at the term at which the order was made to summon a jury from the cities of Richmond and Petersburg, only one qualified juror was obtained from a *venire* of twenty-four. In addition, it appeared from the testimony of both the commonwealth and the accused, who was asking for a change of venue, that it would be very difficult, if not impossible, to get qualified jurors in the county where the court was sitting.



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In *Chahoon's case*, *supra*, there had been a mistrial at the March term of the court. At the June term of the court, all of the *venire* summoned to try the prisoner were present except one, but none of them being found to be qualified jurors, the prisoner moved the court to have other persons summoned as jurors from the city (Richmond), but the court overruled his motion, being satisfied, as the order states, "by evidence adduced and heard that qualified jurors could not be conveniently found in the city," and ordered jurors to be summoned from two other cities. In that case, the sergeant of the city and one of his deputies testified, giving the reasons upon which they based their judgment that it would be inconvenient, and they believed impossible, to get a jury from the city.

In *Sand's Case*, reported in the same volume, at page 871, the accused had been found guilty and the judgment reversed by this court (20 Gratt. 800), and after it had been remanded, there had been a mistrial. On that (second) trial, after there had been an abortive effort to get a jury from the city of Richmond, where the case was tried, a jury was summoned from another city. On the third trial, eighteen of the nineteen persons who had been summoned under the writ of *venire facias* appeared, and none of them being qualified jurors because of opinions formed and expressed, as to the case, the court ordered a jury to be summoned from other cities. In considering the propriety of making such order, the court, by consent, read the testimony heard upon this point at the second trial, part, of which was that of the sergeant of the city of Richmond and his deputy, that it would be very inconvenient, if not impossible, to get a jury in the city of Richmond.

The facts upon which the court based its judgment in those cases, respectively, in ordering juries from other jurisdictions, are not mentioned for the purpose of indicating that we think it was necessary to show as much as appeared in those cases, or that the facts upon which the court based its action should be

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established in the same manner, but to show that in order for the trial court to exercise the discretion vested in it under section 4024 of the Code, it should appear in some manner that such a course is reasonably necessary in order to obtain qualified jurors. The facts upon which the court based its order in this case do not show that it would have been inconvenient, within any reasonable meaning of that word, to have obtained qualified jurors from Floyd county, whose population was more than fifteen thousand, for the trial of the accused.

Manifestly, it was not intended by the provisions of section 4024 of the Code that an accused person should be deprived of the right of "a trial by a jury of his vicinage" (that is, of the county or corporation where he is to be tried) secured to him by the constitution (section 8, article 1), and the laws of the state (Code, secs. 4018, 4019 and 4024), merely because there had been two previous protracted trials in which the juries had failed to agree, and because in selecting the jury for the first trial, twenty-seven persons had to be summoned in order to get a panel of sixteen qualified jurors, and in obtaining a jury for the second trial, forty-eight persons were summoned, only forty-one of whom it seems had to be examined in order to get a panel of sixteen jurors free from exceptions. If these facts alone are sufficient to authorize a trial court to summon a foreign jury, the right intended to be secured by the constitution and laws of the state would be of little value to the accused, and there would be comparatively few cases in which there was much public interest, or about which there was much excitement, where the court would not find it necessary to summon, or at least feel justified in summoning, a jury from another county or corporation.

We are of opinion, therefore, that the facts disclosed by "the record," upon which alone the court based its action, were plainly insufficient to justify the order complained of, and for that error its judgment must be reversed.

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The next error assigned is to the action of the court in admitting improper evidence, and in refusing to properly instruct the jury in reference thereto.

No witness testified that he was present when the deceased was shot. The evidence relied on to establish the commonwealth's charge is entirely circumstantial. Among other things, the commonwealth sought to prove that some eighteen months prior to the killing, the accused had in his possession and was using as a part of his hunting outfit, a bottle containing oiled or greased shot; that the same bottle, containing oiled or greased shot, was found the morning after the killing near the scene of the shooting; and that between "the blind," the point from which it is claimed the shot was fired, and the point where the deceased was when struck there were powder-burnt leaves, and on the leaves some black oily or greasy substance, with which water would not mix. Tice, one of the witnesses whose testimony was objected to, stated among other things, that he "examined the leaves on the bushes between the fence corner and the buggy, in a line with the buggy and the pine bush from which a limb that was shot was hanging, and in a line with the shot; that he found on the leaves a black, oily, greasy something that indicated or looked like oil or some other kind of grease, that glazed the leaves, and the water on them was in beads or puddles and would not mix; that at the time he examined the leaves and at this time, he was of opinion that it was oil or grease." At this point the accused objected, and moved the court to exclude the witness' opinion as evidence; but the court permitted the witness to proceed, who then added that "he could not tell whether it was oil, butter or some other kind of grease, but at the time, he believed it was oil or some other kind of grease, and to the best of his knowledge and belief, it was oil or some other kind of grease. He did not know if a man's belief was as strong as his knowledge."

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The objection made to this evidence is that it was merely the witness' opinion and belief.

It is well settled that the opinions of witnesses are generally inadmissible; that they must testify to facts only, and not as to opinions or conclusions based upon facts. But there are exceptions to the rule as well settled as the rule itself. *Va. &c. Chem. Co. v. Knight*, 106 Va. 674, 676-7, 56 S. E. 725, and authorities cited; *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174; 1 Elliott on Ev., sec. 672.

Where a person has a special opportunity for observation, he may testify to his opinions as conclusions of fact, although he is not an expert, if the subject matter to which the testimony relates cannot be reproduced or described to the jury as it appeared to the witness at the time and the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding; but the facts and circumstances upon which he bases his opinion or conclusion should be stated as far as is practicable, in order that the jury or other tribunal may have some basis upon which to test the value of his opinion. See *Jordan v. Commonwealth*, 25 Gratt. 943, 945-6; 1 Elliott on Ev. ss. 675, 676, 678; 17 Cyc. pp. 81-87. In the text-books cited, numerous instances are given where the opinion of witnesses may be received. Among them are identity and the appearance of things animate and inanimate.

In the last-named work it is said, in discussing this question, p. 86, "A witness may, after enumerating such as he can of the constituent facts, state the effect on his mind of the numerous phenomena which constitute the impression of appearance, whether of animate or inanimate objects, it being affirmatively shown that the witness had adequate opportunity for observation; that the constituent facts cannot be fully placed before the jury; and that the ultimate fact is relevant to the issue."

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Tested by this rule, which seems to us the correct one, the evidence of Tice was admissible.

Upon the same grounds, the evidence of Conner and Poff, that the mustache worn by the man who had been seen by them, and who the evidence tended to prove was the accused, appeared to them, or was, in their opinion, a false mustache, was admissible.

And for like reasons the evidence of Noah Wilson and Lee Poff, as to the identity of the bottle found near the place of shooting with the bottle they stated they had seen in the possession of the accused some eighteen months prior to the killing, was also admissible.

The instructions "J" and "K", offered by the accused and rejected by the court, mentioned in the same assignment of error, asked the court to tell the jury to disregard the evidence of these witnesses as to the shot-bottle, because they did not attempt to identify it, but only expressed their opinion or belief as to its identity. These instructions were based upon the same erroneous view as was the objection to the evidence when offered, and for the same reason that the court overruled the objection to the evidence, it properly refused to give the instructions.

Dr. Thomas, a witness for the commonwealth, who was called to visit the deceased professionally after he was shot, testified that he reached him about two hours afterwards; that the deceased "was in a state of shock. He realized he was seriously hurt. I think he was conscious of impending death. I think he knew what he was talking about." The witness was then asked: "Did he state anything to you about a man getting in the buggy and riding with him? If so, what did he state?" To which witness replied: "He spoke of that. I asked him about the man getting in the buggy with him near Copper Hill, and he said a man got in the buggy with him near Copper Hill. I asked him if the man asked to ride with him, or did you ask

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the man to ride?; and he said, 'I asked the man to ride,' I asked him who it was, and he said the man lived over about Ferrum, and tried to call his name, and seemed to be unable to call it. He was so weak he could not. He said the man got out of the buggy before and beyond where he was shot. That was before Dr. Huff came. He did not say whether the man had a gun or not."

This question and answer were objected to, but the court overruled the objection. This action of the court is assigned as error.

The evidence was not admissible, either upon the ground that it was part of the *res gestae* or as a dying declaration. It is not claimed that the man who got in the buggy with deceased was the accused. On the contrary that man had been called by the commonwealth as a witness and stated substantially the same as to his getting in and out of the buggy.

In order for a statement to be a part of the *res gestae*, it must, as was said in *Haynes' Case*, 28 Gratt. 942, 946, be "so connected with the very transaction or fact under investigation as to constitute a part of it." *Joyce's Case*, 78 Va. 287, 290; *Barley v. Byrd*, 95 Va. 316, 322, 28 S. E. 329, 1 Elliott on Ev., sec. 154.

The fact that some one, other than the accused, at the request of the deceased, rode with him in his buggy, and then left him before reaching the point where he was shot, is in no way connected with the transaction or fact under investigation—certainly not so connected with it as to constitute a part of it.

The statements of the deceased were not admissible as dying declarations, because they did not relate to the cause of the death, nor to any circumstance of the transaction which resulted in death. They do not tend to identify the accused as the guilty party, nor do they establish the circumstances of the *res gestae*, or show any transaction from which death resulted.

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*Swisher v. Commonwealth*, 26 Gratt. 964, 21 Am. Dec. 330; *O'Boyle's Case*, 100 Va. 785, 795, 40 S. E. 121.

"Declarations," says Elliott on Ev., sec. 336, "of distinct or separate, prior or subsequent occurrences, \* \* \* are not competent evidence. These and other such declarations are not competent because they relate to distinct and separate transactions." See also sections 332, 333; 21 Cyc. 973-975.

Assignments of error based upon bills of exception numbered 5, 12 and 16, may be considered together.

On the first trial, the commonwealth put on the stand a witness named Conner, who testified, among other things, to the measurement of certain tracks leading from the "blind" from which the deceased was shot. On the last trial this witness was again put upon the stand by the commonwealth, but it asked no questions as to the said tracks or the measurements made by him. The defendant, upon his cross-examination, sought to have the witness testify as to the tracks and his measurements. This was objected to by the commonwealth, upon the ground that, in asking about these matters he was making the witness his own. This objection was sustained by the court, but, in sustaining the objection, the court stated that the defendant could recall the witness when the commonwealth was through with its evidence, and examine him as to the tracks. Afterwards, whilst the defendant was introducing his evidence, upon his motion the witness was placed upon the stand by the court as its witness, and the prisoner's counsel was permitted to cross-examine him as to the tracks and measurements. The action of the court in refusing to permit the accused to cross-examine the witness as the witness of the commonwealth is assigned as error.

In the course pursued by the court, no prejudice resulted to the accused.

To rebut the evidence of this witness as to the tracks, which was regarded as favorable to the accused, because it tended to show that the tracks measured by the witness were shorter than

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the shoes which the accused wore or could wear, the commonwealth introduced a witness named Jack, who testified that during the second trial of the accused, he had gone to the scene of the shooting and made tracks with his own and the shoes of another, and found that the tracks were shorter in every instance than the shoes.

The objection made to this evidence is that it did not appear that the experiments made by the witness were made under the same conditions as those which existed on the day of the murder.

It is not clear from the evidence that the conditions were the same or substantially similar, and unless they were, it seems to be well settled that such experiments are not admissible. 1 Elliott on Ev., sec. 1249; *Richmond P. & P. Co. v. Racks*, 101 Va. 487, 44 S. E. 709; *Wise Ter. Co. v. McCormick*, 104 Va. 400, 51 S. E. 731. As the case will have to be reversed upon other grounds, it is unnecessary to pass upon this question, but it is proper to say that, if upon another trial, evidence of such experiments be offered, it should not be admitted unless it satisfactorily appears that they were made under the same or substantially similar conditions to those surrounding the shooting of the deceased.

The refusal of the court to permit its notes taken at a former trial of the case to be used for the purpose of contradicting a witness introduced by the commonwealth, is assigned as error.

If the witness had testified differently at the former trial as to any matter which was material and relevant to the issues presented by the trial, proof of such contradictory statement was clearly admissible. But it is generally agreed in this country that the judge's notes are not admissible evidence for that purpose, because the notes, however full they might be, were not taken in the discharge of any official duty, but for the judge's own private convenience. See 3 Wigmore on Ev., sec. 1666, and cases cited in note 1.

The action of the court in refusing to give instructions



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marked A, B, C, D, E, F, G, H, I, J and K, asked for by the accused, and in giving instruction No. 3, asked for by the commonwealth, is assigned as error.

The court gave five instructions offered by the commonwealth, ten offered by the accused, and three in lieu of instructions offered by the accused, making in all eighteen instructions. Without discussing in detail any of the instructions given or rejected, it is sufficient to say, that in our opinion the court did not err in refusing to give the instructions rejected by it, as the instructions given fully and fairly submitted the case to the jury, and when that has been done, there is no necessity or propriety in giving other instructions asked for by either party, even if they be correct statements of law as applied to the case, and they cannot subserve any good purpose, and may by their very number and the different manner in which the same proposition is stated confuse the jury. *McCue's Case*, 103 Va. 870, 49 S. E. 623; *Southern Ry. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 713, 1 Va. App. 3.

The errors assigned to the action of the court, based upon bills of exception numbered 13, 15, 17 and 18, need not be specially considered, as the rulings of the court upon the questions raised in each seem to us to have been clearly right.

The refusal of the court to set aside the verdict because contrary to the law and the evidence, and grant the accused a new trial, is assigned as error. As the verdict will have to be set aside and a new trial granted for errors hereinbefore indicated, it will be unnecessary and might be improper to consider this assignment of error, as the evidence may not be the same upon the next trial.

We are of opinion, therefore, to reverse the judgment of the circuit court, set aside the verdict, and remand the cause for a new trial.

*Reversed.*

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Statement.

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**Richmond.**

WOODSON v. COMMONWEALTH.

January 16, 1908.

1. **CRIMINAL LAW—Attempt to Rape—What Constitutes—Force.**—To constitute the offence of an attempt to commit rape there must be force, or an intention to use force, on the part of the offender, in the perpetration of the offence, if necessary to overcome the will of the victim. The evidence must establish force or attempted force, coupled with an attempt to gratify the lustful desire, against the consent of the female, and notwithstanding resistance on her part.
2. **CRIMINAL LAW—Presumption of Innocence—Attempt to Rape—Force—Case at Bar.**—The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence. In the case at bar, the evidence shows an assault by a negro man upon a white woman, accompanied by grossly insulting and indecent language, but fails to show any force or attempt at force on the part of the man to accomplish his purpose, whatever that may have been. The evidence is consistent with a desire on his part to have sexual intercourse with the woman, but does not show an intention to use force, if necessary, to gratify his desire; but persuasion only.

Error to a judgment of the Circuit Court of Buckingham county.

*Reversed.*

The opinion states the case.

*Moon & Moon*, for the plaintiff in error.

*Robert Catlett*, Assistant to Attorney-General, and *Sands Gayle*, for the commonwealth.

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HARRISON, J., delivered the opinion of the court.

The indictment in this case charges the accused with an attempt to commit rape upon a certain female. In such cases, force is an essential element of the crime. To sustain the charge of an attempt to commit rape, there must be evidence of force, or of an intention on the part of the offender to use force in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim. The crime of assault with intent to rape can only be established by proof of force or attempted force, coupled with an attempt to gratify the lustful desire, against the consent of the female, notwithstanding resistance on her part. *Hairston v. Commonwealth*, 97 Va. 754, 32 S. E. 797; *Cunningham v. Commonwealth*, 88 Va. 37, 13 S. E. 309; *Christian v. Commonwealth*, 23 Gratt. 954; *Jones v. State*, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; *Dorsey v. State*, 108 Ga. 477, 34 S. E. 135; *Massey v. State*, 86 N. C. 658, 41 Am. Rep. 478; *Green v. State*, 67 Miss. 356, 7 South. 326.

In the case at bar, the testimony of the prosecutrix is the only evidence showing the facts and circumstances attending the occurrence. She says, that before dark, on the 9th of January, 1907, she went to the spring, about one-fourth of a mile from her home, to get a bucket of water; that, when returning, the accused was standing in the path with a double-barrel shot-gun and his face blackened, though she could see the natural color of his neck and hands; that he followed her along the path, and when she had gotten about half-way home, he came up to her and seized her arm and said, "Hold on, I want some;" that she screamed and ran to a neighbor's house, who lived about two hundred yards from her home, and told him of the occurrence; and that this neighbor went down there with his gun, but could find no one.

This evidence shows that the conduct of the accused was

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Dissenting Opinion.

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shockingly indecent and insulting, and, if believed by the jury, subjected him to a conviction for an aggravated assault; but the court is of opinion that it falls short of showing a felonious intent. However reprehensible his conduct, we are constrained to say that the testimony fails to show any attempt on the part of the defendant to employ any force whatever in the accomplishment of his purpose, whatever that may have been. There was no attempt to use force, no threat; only solicitation. The absence of all violence and of evidence of any intention to use force, if necessary, to overcome the will of the prosecutrix, the time and the place, invest the charge with improbability. The evidence is consistent with a desire on the part of the offender to have sexual intercourse with the prosecutrix, but there is no evidence of an intention to use force, if necessary, to gratify his desire; only persuasion.

"The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." *Hairston's Case, supra*.

This conclusion makes it unnecessary to consider other assignments of error.

We are of opinion that the circuit court erred in refusing to grant the plaintiff in error a new trial, for which error its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

WHITTLE, J., (dissenting):

I cannot concur in the opinion of the court in this case, that the evidence for the commonwealth is insufficient to establish the *corpus delicti*, the attempted rape charged in the indictment.

The testimony of Mrs. Dunkum (a young married woman) bearing upon the essential fact of the attempted commission of the crime—which in many of its features is corroborated by other testimony—is certified as follows: "On January 9, 1907, she went to the spring, about one-fourth of a mile from her

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home, to get a bucket of water; she dipped out the water and started home; the accused \* \* \* was standing in the path and asked her, 'Who lives up there?' She replied, 'Elijah Dunkum.' The accused had a double-barrel shot-gun and his face blackened, but she could see the natural color of his face and hands. She started on home with the water, and the accused followed her along the path; when she had gotten about half way home, he said something which she did not hear sufficiently to know what it was; the accused then came up to her and seized her left arm, and said, 'Hold on,' " accompanying that action and language with the declaration of his lustful desire. Whereupon she screamed and ran to the house of a neighbor, who lived about two hundred yards distant from her home, and in an agitated and excited manner told him what had occurred. The neighbor, armed with a gun, repaired to the scene of the crime, but the accused had disappeared.

These facts, together with the reasonable inferences which the jury were justified in drawing from them, in my opinion, maintain the following propositions: That the accused (a young negro man), armed with a double-barrel shot-gun, disguised himself to prevent identification, and beset the path along which Mrs. Dunkum was returning from the spring to her home, for the purpose of intercepting her, and of having carnal knowledge of her person against her will; that he pursued her along the pathway with that design; that he made known his lecherous desire, commanded her to stop in order that he might accomplish his purpose, and attempted to enforce the demand by laying hold of her person; and that he was deterred by her screams alone from the consummation of the offence.

It must be observed that the language of the accused did not import an indecent proposal, but conveyed a distinct demand, accompanied by a coercive act, conducing to its fulfilment; and that the resistance and outcries of his intended victim frightened him off and prevented its consummation. If the foregoing are

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warrantable deductions from the facts proved, it can hardly be said that they fall short of proving the *corpus delicti*.

In this class of cases, the authorities are agreed that each case must be governed by the attendant circumstances; "Among which," as was said in *Christian's Case*, 23 Gratt. 954, "the character and condition of the parties may have an important bearing. Acts of the accused, which would be ample to show and produce conviction on the mind that it was the wicked attempt and purpose to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt if they were acts done to a female of dissolute character or easy virtue." The facts of that case were, that the accused and the prosecutrix, both of whom were negroes, had attended an exhibition together in the night; that she was a base woman, the mother of two bastard children; that there was no attempt on his part to ravish her, the court characterizing his conduct toward the woman as "rough wooing" merely, and emphasizing the circumstance that there was no outcry on her part.

So also, in the latest pronouncement of this court on the subject (*Hairston's Case*, 97 Va. 754, 32 S. E. 797), though the conviction was not sustained, the reasoning of Judge Riely conclusively shows that all the elements of the offence are present in the case in judgment. The learned judge remarks: "To sustain the charge of an attempt to commit rape, there must be evidence of force, or of an intention on the part of the offender to use force in the perpetration of the heinous offence, if it should become necessary to overcome the will of his victim." At page 757 of 97 Va., page 797 of 32 S. E., in summing up the circumstances of that case, it is said: "There was no attempt to use force, no threat, only solicitation. The absence of all violence and of evidence of any intention to use force, if necessary to overcome the will of the prosecutrix; the time and the place, and all the surrounding circumstances invest the charge with very great improbability."

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The converse of the preceding enumeration of circumstances plainly appears from this record.

In conclusion, I desire to remark, that in estimating the significance of those circumstances, we must not close our eyes to the existence of a Black Peril, which rests like a pall over the land, and constitutes an everpresent menace to the safety of the white women of the south. Confronted by this horrible condition, which is known of all men and deplored by the right-thinking element of both races, we cannot, I submit, upon the cogent evidence before us, afford to set aside the verdict of the jury and establish a precedent, the dual tendency of which, in my judgment, will be to increase crime and to encourage resort to mob violence.

*Reversed.*

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Syllabus.

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**Richmond.****WHITE v. COMMONWEALTH.**

January 16, 1908.

1. INTOXICATING LIQUORS—*Sale Without License—Indictment—Place of Sale—Time.*—An indictment for selling liquor without a license is sufficient which follows the language of the statute in charging that the defendant “in said county within the two years last past, did, unlawfully and without a state license so to do, sell spirituous or malt liquors, whiskey, brandy or some mixture thereof, alcoholic bitters, bitters containing alcohol or some mixtures, preparations or liquors which will produce intoxication.” *Place* is not of the essence of the offence under such a statute, and need not be more specifically stated than “in said county;” nor is the exact *time*, and the charge of within “two years last past” is sufficient.
2. INTOXICATING LIQUORS—*Sale Without License—Evidence—United States License—Proof of Certificate.*—The fact that a statute permits the existence of a United States revenue license to sell liquor to be proved by the testimony of the internal revenue collector for the district, or any of his deputies who know the fact, does not exclude the proof of the existence of such license by the duly authenticated certificate of such collector. The presumption is that the legislature meant to provide additional modes of proof, and not to exclude any existing lawful proof of the fact. The certificate is the most convenient and certain mode of proof, and its use could not have prejudiced the accused in this case.
3. INTOXICATING LIQUORS—*Sale Without License—United States License—Case at Bar—Instructions.*—A statute provides that the possession of a United States license to sell liquor by retail and no such license from state, shall be evidence of selling by retail without a state license to do so. An indictment under the statute, found March 18, 1907, charged defendant with a sale without license within two years last past. The only evidence offered by the commonwealth was the possession by the defendant of a United States license to sell liquor from July 31, 1906, to June 30, 1907. The court instructed the



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jury that if they believed from the evidence that the accused "held a license as a retail malt liquor dealer from the United States government, within two years last past from the 18th of March, 1907, the possession of such license shall be evidence of selling malt liquor by retail."

*Held:* The instruction was erroneous, as, under it, the jury might have found the accused guilty of having committed the offence between March 18, 1905, and July 31, 1906, when there was not a shadow of evidence upon which to base such a conviction. All that is stated in the instruction may be true, and yet the accused not guilty.

4. INTOXICATING LIQUORS—*Sale Without License—United States License—Effect as Evidence.*—If, on an indictment for selling liquor without license, the commonwealth simply proves the possession of a United States license to sell liquor, the probative value of such evidence is to be determined in connection with all the other evidence in the case, and is primarily a question for the jury, with respect to which this court, at present, expresses no opinion.

Error to a judgment of the Circuit Court of Mathews county on an indictment for selling liquor without license.

*Reversed.*

The opinion states the case.

*J. N. Stubbs*, for the plaintiff in error.

*Robert Catlett*, Assistant to Attorney General, for the commonwealth.

KEITH, P., delivered the opinion of the court.

White was indicted under "an act to suppress tippling houses, the illegal and unlawful sale or traffic in ardent spirits, in the county of Mathews, and to provide a penalty therefor." Acts of Assembly, 1901-2, p. 765.

The indictment is in the following words: "The jurors of the commonwealth of Virginia, in and for the body of the county of Mathews, and now attending said court at its March term,

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1907, upon their oath present, that J. T. White, in said county and within the two years last past, did unlawfully and without a state license so to do, sell spirituous or malt liquors, whiskey, brandy, wine, ale, beer, or some mixture thereof, alcoholic bitters, bitters containing alcohol, or some mixtures, preparations or liquors which will produce intoxication, against the peace and dignity of the commonwealth."

A demurrer to this indictment was overruled; a plea of not guilty entered, upon which the jury rendered a verdict of guilty, and assessed a fine of \$250; and to the judgment upon that verdict a writ of error was awarded by this court.

The first error assigned is to the judgment of the court upon the demurrer.

The indictment follows the statute, and this is sufficient.

In *Commonwealth v. Young*, 15 Gratt. 664, it is said: "It is generally proper and safest to describe the offence in the very terms used by the statute for the purpose. But it is sufficient to use in the indictment such terms of description as that, if true, the accused must of necessity be guilty of the offence described in the statute."

The specific objection taken to this indictment is that it does not state the place at which the sale was made, and *Arrington's Case*, 87 Va. 96, 12 S. E. 224, is relied upon; but that is of a class of cases such as *Head's Case*, 11 Gratt. 819, *Boyle's Case*, 14 Gratt. 674, and *Young's Case*, *supra*, in which the place was of the essence of the offence. In *Head's Case*, for instance, the indictment was for the selling of ardent spirits by retail, without a license, to be drunk where sold. The court held that it was not sufficient to state that the sale was in the county, but the place in the county where the sale was made must be set out, in order that the defendant might make a satisfactory defence. The prosecution took place under section 18, Ch. 38 of the Code of 1849, which provides, that "If any person shall, without paying such tax and obtaining such certificate as is prescribed

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by the 14th section, sell, by retail, wine, ardent spirits, or a mixture thereof, to be drunk in or at the store, or other place of sale, he shall, unless he be licensed to keep an ordinary at such store or place, forfeit thirty dollars." The court, in its opinion, says: "The grand jury intended to present an offence against the latter clause of this statute. This offence is local in its nature. Place is of essence, and yet no place is alleged but the whole county. A sale of ardent spirits by an unlicensed dealer, not to be drunk at the place of sale, would fall within the first clause of the section above cited. The identity of the place at which the spirits were to be drunk, with the place at which they were sold, enters into and forms part of the offence under the latter clause of the statute. If this be so, the defendant should be apprised of the place alleged, so that he may be prepared with proof, if any he have, to show that the place of sale and that of drinking are not the same."

*Boyle's Case*, *supra*, has no particular bearing upon this point, and *Young's Case* appears to be an authority in favor of the judgment here.

The demurrer was properly overruled.

The indictment charges the offence to have been committed within "two years last past," and the accused asked that the commonwealth be required to elect on what day within the two years the offence was committed for which it would prosecute. The refusal of the court to do this is assigned as error.

In support of this assignment, the case of *Hatcher & Shaw v. Commonwealth*, 106 Va. 827, 55 S. E. 677, is relied upon. It was there held, that where, upon the trial of an indictment containing a single count, charging the defendant with the illegal sale of liquor to certain designated parties "at divers times within the last twelve months," evidence has been received tending to show a number of distinct sales covering a period of several months, the commonwealth may be required, before the

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prisoner opens his defense, to elect on which of the sales it will proceed.—A very different case from the one under consideration.

The assignment of error is without merit.

During the progress of the trial, the commonwealth introduced the following paper:

“I, M. K. Lowry, collector of internal revenue for the Second District of Virginia, do hereby certify that Record 10, in this office, discloses the fact that the following persons paid special tax as retail liquor dealers and retail malt liquor dealers in the county of Mathews, state of Virginia, on the dates and for the periods hereinafter set forth, and that special tax stamps were issued them as per the numbers given, viz: . . . . . and J. T. White, New Point, Va., as R. M. L. D. for the period of eleven months ending June 30, 1907, stamp No. 13472.

“Witness my hand and seal of office this, the 6th day of March, 1907.

“(SEAL)

M. K. LOWRY, Collector.”

“United States of America, Eastern District of Virginia:

“I, Edmund Waddill, Jr., United States district judge within and for the Eastern District of Virginia, do hereby certify that M. K. Lowry, whose name is attached to a certain certificate purporting to be a record of special tax payers in Mathews county, in the second collection district of Virginia, hereto attached, certified as a copy from record No. 10 in his office, is and was at the time of signing such certificate collector of internal revenue of the United States for the second district of Virginia, which said district comprises among other counties, the county of Mathews, that his said signature thereto is, I believe, his genuine signature, and his acts as such collector are entitled to full faith and credit.

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"This certificate is made pursuant to section 906 of the Revised Statutes of the United States.

"EDMUND WADDILL, JR.,  
"United States District Judge."

The clerk of the court then certifies under the statute that the Honorable Edmund Waddill, Jr., was the duly qualified district judge of the United States for the Eastern District of Virginia.

By section 5 of the act before cited for the suppression of the sale of ardent spirits in the county of Mathews, it is provided, "That the fact that any person, firm, or corporation, or joint-stock company have a license as a retail liquor dealer from the United States of America, and no such license from the state of Virginia as such dealer, shall be evidence of selling by retail at said place without a state license so to do, and the fact that a person has such United States license may be proved by the evidence of the internal revenue collector for said district, or any of their deputies who know the fact, or by any person who has seen said license."

The contention is that the fact that the United States license had been procured was not in this case proved in the manner provided for by this statute, which is true. It was proved, however, in a lawful manner, and we presume that the legislature, by stating the manner in which it might be proved, did not intend to exclude any lawful proof of the fact, but rather that its purpose was to provide additional modes of proof. The mode adopted in this case was the most certain and convenient, and could not have prejudiced the accused.

The only evidence introduced upon the trial by the commonwealth was this paper, above referred to. The only evidence introduced by the defendant was his own testimony—that he was 75 years of age, was a native of Accomac county, had resided in Mathews county for 53 years, that he had not sold any intoxicating liquors within the past two years, from March 18,

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1907, that he had sold sweet cider, that he was the father of nineteen children, and that his youngest child was five years of age.

When the testimony was all in, the court gave to the jury the following instruction: "The court instructs the jury that when spiritous or malt liquors or any mixtures, preparations or liquors which will produce intoxication are parted with, and any pay, compensation, consideration is left, given or conveyed to the person or to another at the place, or if any understanding or agreement therefor is tacitly or expressly agreed on, whether done directly or indirectly, or whether it be nominally for another's benefit or consideration, it shall be deemed a sale within the intent of the law; but the court further instructs the jury, if they believe from the evidence that J. T. White, the accused, held a license as a retail malt liquor dealer from the United States Government, within two years last past from the 18th of March, 1907, the possession of such license shall be evidence of selling malt liquor by retail, but before the jury shall convict the accused they must believe beyond all reasonable doubt from the evidence in this prosecution, that he sold malt liquor within two years last past, from the 18th day of March, 1907."

The giving of this instruction is one of the errors assigned.

The offence here charged is that the plaintiff in error sold intoxicating liquors within two years last past, from the 18th day of March, 1907, in the county of Mathews. It was no offence to have in his possession a United States Government license. The office of the government license was to prove the unlawful sale of ardent spirits. Now, this license only came into operation on the 31st day of July, 1906, whereas the "two years last past," from the date of the indictment would go back to the 18th of March, 1905. There was a period, then, from March, 1905, to the 31st day of July, 1906, within which the offence might have been committed, and under the instruction the jury might have found the accused guilty; and if such had been the case, it would have been without a shadow of testimony,

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for there was no independent evidence of the offence. The only evidence is the effect which, by virtue of the statute, is attributed to a license from the government of the United States, and that could not have been *prima facie* evidence except during the eleven months from the 31st of July, 1906, to the 30th of June, 1907. It covered, therefore, only something less than eight months of the two years preceding the 18th of March, 1907.

In giving this instruction, we are of opinion that the circuit court erred.

In *Young's Case, supra*, it is said: "If the indictment may be true, and still the accused may not be guilty of the offence described in the statute, the indictment is insufficient." And the same is true of an instruction.

The court tells the jury here, that the possession of a retail liquor license within two years last past from March 18, 1907, shall be evidence of selling malt liquors by retail, and yet all that is stated in that instruction may be true, and doubtless was true, without there being a scintilla of evidence against the accused, to be deduced from the license or otherwise, between the 18th day of March, 1905, which is the beginning of the "two years last past," from the 18th of March, 1907, as set out in the instruction, and the time when the license went into effect, which was eleven months prior to the 30th of June, 1907, to-wit: on the 31st of July, 1906.

The statute prescribes that the possession of a United States license shall be evidence of selling by retail at the place named in the license; but the probative value of such evidence is to be determined in connection with all the other evidence in the case, and is a question primarily for the determination of the jury, with respect to which we, for the present, express no opinion.

For these reasons, the case must be reversed and remanded for a new trial.

*Reversed.*

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**Richmond.****HUNTER v. COMMONWEALTH.**

January 23, 1908.

1. **STEAMBOATS—Wharfage—Public Use—Code 1904, Section 12940—Constitutional Law.**—If a steamboat wharf is leased to a steamboat company for a percentage of all freight and passenger traffic over the wharf, but no charges are made by either the owner or lessee for the use of the wharf, but the public is permitted to use it without compensation, such wharf is not within the intentment of section 12940, Code 1904, requiring certain accommodations to be provided and imposing a penalty for the neglect thereof. The provision of the section that it is "not to apply to any wharf where no wharfage is charged," means no wharfage to the public. The public is not affected by such a use of a wharf as is above described, and any attempted regulation of its use would be an unwarrantable invasion of private rights.

Error to a judgment of the circuit court of King George county.

*Reversed.*

The opinion states the case.

*St. George R. Fitzhugh and A. T. Embrey*, for the plaintiff in error.

*Robert Catlett*, Assistant to the Attorney-General, for the commonwealth.

WHITTLE, J., delivered the opinion of the court.

Robert W. Hunter brings error to a judgment of the circuit



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court of King George county, convicting him of a misdemeanor, and imposing a fine for the alleged violation of section 1294o, Va. Code, 1904.

That act requires the owner of a steamboat wharf to provide suitable accommodations for the patrons of steamboats using the wharf, including "separate and non-communicating rooms for the white and colored races;" such rooms to be properly lighted and heated from one-half hour before the scheduled arrival of the boat until such time after its departure as will provide for the accommodation of debarking passengers. The act prescribes that a violation of its provisions shall constitute a misdemeanor, punishable by fine, and concludes with the proviso: "that this act shall not apply to any wharf where no wharfage is charged."

It appears from the agreed facts, that the plaintiff in error is the life tenant of the wharf in question, which, at the time of the institution of the prosecution, was used by the Washington and Potomac Steamboat Company for the reception and delivery of freight and passengers, under an agreement, by the terms of which the company paid Hunter ten *per centum* of all freight and passenger traffic over the wharf; that the company charged no wharfage or toll on any freight or passenger traffic for the use of the wharf, but suffered the public to use it without compensation; that Hunter never exacted any wharfage from the public; and that the amount paid by the company to him was regarded by both parties as "rent" for the use of the wharf, "so that the steamboat company might throw it open to the public free of charge."

Upon the foregoing facts, it is clear that the case in judgment is not within the intendment of the act. The basic principle upon which the power of the legislature to regulate individual or corporate use of private property rests, is, that the public are directly affected by such use. Where the public are not so affected, there is no occasion—and, indeed, no authority—for the exercise of this paternal governmental function; and any

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such attempted regulation would constitute an unwarrantable invasion of private right.

In the "*Sinking Fund Cases*," 99 U. S. 727, 25 L. Ed. 504, Mr. Justice Bradley, in discussing the scope of the decision in *Munn v. Illinois*, 94 U. S. 112, 24 L. Ed. 77, observes: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

In that case, the supreme court of the United States held, with respect to certain warehouses in the city of Chicago, operated by the owners without being incorporated, that, "When the owner of property devotes it to a use in which the public has an interest he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as he maintains the use." And it was upon that theory that the court sustained the constitutionality of the Illinois statute regulating warehouse charges.

In order that this act may not contravene the 14th Amendment, we must interpret the proviso as if it read: "this act shall not apply to any wharf where no wharfage is charged to the public." When so construed, the enactment is in harmony with the legislative policy of the state in regard to public service corporations, and the true principle upon which the power of governmental control is founded.

For these reasons, without further elaboration of the well recognized principles involved, we are of opinion to reverse the judgment of the circuit court and dismiss the prosecution.

*Reversed.*

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Syllabus.

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**Richmond.****THURMAN v. COMMONWEALTH.**

January 23, 1908.

1. **CRIMINAL LAW—*Venire Facias*—List**—“*Of His County or Corporation*”—A writ of *venire facias* which directs a sergeant to summon “sixteen persons from the list attached,” which is the list required to be drawn from the box provided by sections 3142 and 3144 of the code, necessarily requires that such persons be “of his corporation,” as only residents of his corporation are included in the list from which he is directed to summon sixteen. The writ and the list attached constitute the writ of *venire*, and are to be read together.
2. **CRIMINAL LAW—*Venire Facias*—When to be Returnable**.—A writ of *venire facias*, returnable to the second day of the term of a trial court is not for that reason invalid on its face as the court or the judge in vacation had the right to direct it to be so returnable, and, if no ground is assigned in the trial court for quashing the writ, it will be presumed in this court that the judge in vacation directed the writ to be returnable to the second day of the term.
3. **JURORS—Incompetency—Objection After Verdict**—The objection that a juror is not competent because of some personal incapacity, comes too late after verdict, and is not good ground for a new trial.
4. **CRIMINAL LAW—Evidence—Incriminating Circumstances**.—Evidence that deceased had a large sum of money just before he was killed, but that none was found on his person or among his effects after he was murdered, and that the accused had no money before the death of the deceased, but did have money after, is competent as tending to incriminate the accused when he is otherwise connected with the crime.
5. **CRIMINAL LAW—Insanity—Irresistible Impulse**.—Irresistible impulse to excuse crime must spring from a diseased mind, in other words, must be an insane impulse. It is not error to refuse to substitute “injured mind” for “diseased mind” in this connection.

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6. CRIMINAL LAW—*Murder—Indictment—Record.*—Whether an indictment for murder be of one degree or another is to be determined from an inspection of the indictment itself, and not from the memorandum which the clerk makes on the record of the finding of the indictment. The memorandum is no part of the indictment.
7. CRIMINAL LAW—*Murder—Indictment—Harmless Error.*—One who has been convicted of murder of the first degree upon sufficient evidence cannot raise the objection that the indictment charged him with murder of the first degree, instead of murder generally. It is a matter of no concern to him.
8. CRIMINAL LAW—*Verdict—Open Court—Presence of Prisoner.*—It sufficiently appears from the record in this case that the verdict of the jury was rendered in open court and in the presence of the accused. The record states that the jury “retired to their room to consider of their verdict, and after some time they returned into court, having found a verdict in the following words: ‘We the jury find the prisoner guilty of murder in the first degree, as charged in the within indictment.’ And, thereupon, the prisoner moved the court for a *venire facias de novo*, and that a new trial be granted him, the further hearing of which is adjourned. And the said Leo C. Thurman *alias* F. C. Gould, is remanded to jail.”
9. CRIMINAL LAW—*Bills of Exception—Presence of Prisoner.*—It is not necessary for a prisoner in a felony case to be present in person when bills of exception are presented to and signed by the judge.

Error to a judgment of the Corporation Court of the city of Norfolk.

*Affirmed.*

The opinion states the case.

*James G. Martin*, for the plaintiff in error.

*Attorney-General Wm. A. Anderson*, for the commonwealth.

HARRISON, J., delivered the opinion of the court.

The evidence upon which the plaintiff in error was convicted of murder in the first degree is not before us, and the action

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of the lower court in overruling the motion for a new trial, is not made a ground of objection in this court.

A number of exceptions were taken to rulings made upon the trial, relating chiefly to matters of procedure. The first of these objections is that the court erred in overruling the motion of the accused to quash the first writ of *venire facias*. In support of this contention it is insisted, (1) that there was a fatal omission of the words "of his corporation" from the writ; and (2) that the writ was made returnable on the second, instead of the first, day of the term of the court.

It is true the writ does not, in the language of section 4018 of the Code, command the sergeant to summon sixteen persons "of his county or corporation," but it requires him to summon "sixteen persons from the list attached," which is the list required to be drawn from the box provided for by sections 3142 and 3144 of the Code. Under section 3142, only the names of inhabitants of the county or corporation where the trial court is held can be placed in the box; hence, when the writ directed the sergeant to summon "sixteen persons from the list hereto attached," it necessarily commanded him to summon sixteen persons of his corporation, because only residents of "his corporation," were included in the list from which he was directed to summon sixteen. The writ with the list attached constituted the writ of *venire*. The two are to be read together. See *State v. Alderson*, 10 Yerger, (Tenn.), 523.

It is also true that, in the body of the writ, the sergeant was directed to summon sixteen persons to appear before the judge of the corporation court of the city of Norfolk, on the second day of the June term thereof. The statute provides that the sixteen persons shall be summoned to attend the court "on the first day of the next term thereof, or at such other time as the court or judge may direct." The record does not show any express direction by the judge or the court that the jurors should be summoned to the second day of the term; but it shows that

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the writ was issued in the vacation preceding the term, for a *venire* for the trial of all the cases to be tried at the following term; and as the court, or the judge in vacation, had the right to direct the writ to be made returnable to a day other than the first day of the term, it is not invalid on its face; and as no ground was assigned in the trial court for quashing the writ, it must be presumed in this court, that the judge in vacation had directed it to be made returnable to the second day of the term. See *Wash's Case*, 16 Gratt. 530.

The second assignment of error is that the court erred in not granting the prisoner a new trial, because one of the jurors trying the case was not a citizen of Norfolk, where the crime was committed, but was a citizen of Portsmouth. This assignment is based upon the fact that one of the persons summoned by the sergeant under the second *venire*, issued by direction of the court, though regularly engaged in business in the city of Norfolk for more than six months prior to the trial, was not a voter there, and had probably retained his legal domicile in the city of Portsmouth.

The statute (Code, sec. 4018) provides that no irregularity or error in making out the list shall be cause for summoning a new panel, or for setting aside a verdict or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that such irregularity, error or failure was intentional, or is such as to probably cause injustice to the commonwealth or to the accused.

There is no suggestion in the record that the summoning of the juror in question was with the knowledge that he was a citizen of Portsmouth, or that his being placed upon the jury, by possibility, caused injustice to the accused. Further, this objection comes too late. It was made, not only after the jury was sworn, but after the case was tried. The objection that a juror is not competent because of some personal incapacity, comes too late after a verdict and conviction, and is not good

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ground for setting the verdict aside and granting a new trial. *Poindexter's Case*, 33 Gratt. 766; *Hite's Case*, 96 Va. 489, 31 S. E. 895. See also *Doyle Case*, 100 Va. 808, 40 S. E. 925.

The third assignment of error is to the action of the court in admitting a receipt given by the deceased to the Naval Young Men's Christian Association of Norfolk for \$130.00, and other evidence tending to show that the deceased had received a considerable sum of money a few days before he was murdered.

The theory of the commonwealth was that the accused had murdered the deceased for his money, and this and other evidence was introduced to show that shortly before his death, the deceased had considerable money in his possession; that the accused had no money before the death of the deceased; that the accused had money after the death of the deceased; and that no money was found upon the person of the deceased or among his effects after he was murdered.

The evidence as to the payments made to the deceased was competent as proving circumstances which became incriminating when the accused was connected with the crime. See *Kennedy v. People*, 39 N. Y. 245.

The fourth assignment of error is to the action of the court in inserting the words italicized in the following instruction: "The court instructs the jury, that, even if they believe from the evidence that the defendant killed Dolsen, as charged in the indictment, nevertheless, if the jury believe from the evidence that at the time of such killing the defendant was suffering from such insanity that he did not understand the nature and consequence of such killing, or that from such insanity he did not possess will power sufficient to restrain his impulse *arising from a diseased mind*, they must find the defendant not guilty, on the ground of insanity."

After the instruction was modified by the insertion of the italicized words, the accused moved the court to substitute the word "injured" for the word "diseased," making the italicized

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words read, "arising from an injured mind"; the contention being that the evidence tended to show that in the year 1903 the accused had received a blow on the head which injured his mind.

There was no error in the refusal of the court to make this change. The language of the instruction is in accordance with the established doctrine on the subject of insanity as a defense against crime, and the expression "diseased mind" was more apt and accurate than the words "injured mind." The modification by the court was, properly, to inform the jury that in order to acquit the prisoner upon the plea of insanity, the jury must be satisfied that the accused, in committing the deed, was controlled by an irresistible impulse "arising from a diseased mind;" in other words, was impelled by an insane impulse. See *De Jarnette's Case*, 75 Va. 867.

The fifth assignment of error is that the grand jury returned an indictment for murder in the first degree. This objection is without merit. The memorandum made by the clerk in the record does say that the indictment was for murder in the first degree, but this memorandum is no part of the indictment, and was never seen by the jury. The indictment speaks for itself, and is in proper form. It was sufficient to sustain a conviction of murder in the first degree, but, under it murder in the second degree, or some grade of homicide, not amounting to murder, might have been proved, so far as the indictment is concerned. This objection does not concern the accused, as he has been convicted of murder in the first degree upon evidence which, for the purposes of this appeal, must be presumed to have been sufficient.

The sixth assignment of error is that the record does not show that the verdict was rendered in open court.

The record shows that on June 11, 1907, the jury, in charge of the sergeant, in pursuance of their adjournment, appeared in court, and having heard the evidence in full and the arguments



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of counsel, "retired to their room to consider of their verdict, and after some time, they returned into court, having found a verdict in the following words: 'We, the jury, find the prisoner guilty of murder in the first degree, as charged in the within indictment.' And thereupon the prisoner moved the court for a *venire facias de novo*, and that a new trial be granted him, the further hearing of which is adjourned. And the said Leo C. Thurman, *alias* F. C. Gould, is remanded to jail."

It sufficiently appears from this minute of the proceedings that the verdict of the jury was rendered in open court, in the presence of the accused, who thereupon submitted his motions for a *venire facias de novo*, and a new trial, the further hearing of which was adjourned and the prisoner remanded to jail.

The seventh and last assignment of error is, that the record shows that the prisoner was not present in person, but merely by counsel, when the bills of exception were presented to the court, and made a part of the record.

A sufficient answer to this objection is that it is not necessary for the prisoner to be present in person when the bills of exception are presented to and signed by the judge. This is often done in vacation. The rights of the accused are in no way prejudiced by the bills of exception being signed by the judge in his absence, and to require his presence on the occasion would result often in great inconvenience.

The excellent brief of the learned attorney-general has been most helpful in the preparation of this opinion.

The judgment is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

UZZLE v. COMMONWEALTH.

January 23, 1908.

1. CRIMINAL LAW—*Change of Venue—Facts not Denied—Evidence.*—

Upon an application for a change of venue in a criminal case, facts stated in the petition for removal which the commonwealth does not ask to controvert and which the accused is not permitted to sustain by proof, must be considered as established.

2. CRIMINAL LAW—*Change of Venue—Local Prejudice—Jury from Another*

*County—Case at Bar.*—Where the ground of an application for a change of venue of a criminal case is that there exists such prejudice and excitement against the accused at the proposed place of trial as to endanger the fairness and impartiality of a trial at that place, it is not necessary that the application shall be preceded by a motion for a jury from another county or corporation. The ground of the application is the inability to get a fair and *impartial trial* because of local prejudice, and not the inability to get a fair and *impartial jury*. In the case at bar, the motion for a change of venue on account of local prejudice should have been granted.

Error to a judgment of the Circuit Court of Accomac county.

*Reversed.*

The opinion states the case.

*Thomas H. Willcox and Jeffries, Walcott & Wallcot, for the plaintiff in error.*

*Attorney-General Wm. A. Anderson, for the commonwealth.*

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BUCHANAN, J., delivered the opinion of the court.

When the accused, who was indicted for malicious shooting with intent to kill, was brought into court, he filed his petition for a change of venue. The bill of exception taken to the rulings of the court upon his petition, is as follows:

"Be it remembered, that when this case was called for trial, the accused, by counsel, filed a petition praying for a change of venue, and stated that he desired to prove the facts stated therein.

"Whereupon, the attorney for the commonwealth stated to the court that the military referred to in said petition were not called, or asked for, by any of the authorities of the town of Onancock, or the county of Accomac, and offered to introduce evidence in support of said statement.

"Whereupon, the accused amended his said petition so as to make the same allege, in addition to the facts already stated therein, the fact that the governor had personally visited the scene of the trouble in Onancock, and, after conference with the officers and officials of the county of Accomac, and town of Onancock, deemed it necessary to send the said troops to the said county, and offered to introduce evidence in support of the same.

"The said petition as amended, together with the order of the court referred to therein, is in the words and figures following, to-wit:

"Virginia: In the Circuit Court of Accomac county.

"Commonwealth of Virginia

v.

James D. Uzzle.

"To the Honorable John W. G. Blackstone, judge of said court:

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"Your petitioner, James D. Uzzle, of the county of Accomac, in the state of Virginia, respectfully represents unto your honor as follows:

"(1) That on the 10th day of August, 1907, a riot occurred in the town of Onancock in said county of Accomac, Virginia, in which the storehouse and building of Samuel L. Burton and the printing office of your petitioner were burned by persons because of this excitement against your petitioner, who is a colored man, and who was believed by certain white citizens to be guilty of the offence with which he has been even indicted and because of their indignation against the colored people of the community at that time, and during which riot one John Topping was shot.

"(2) That your petitioner, seeing and knowing that his life was in danger and that it was necessary to leave the town of Onancock prior to the burning of said buildings did leave said town and was compelled to remain in hiding for several days in order to protect himself from violence, if not from death, such was the public indignation which had been aroused against your petitioner and others of his race at that time.

"(3) That on the next day the governor of this state, at the request of the authorities of Accomac county and the town of Onancock, or deeming such course necessary after making a personal visit to the county, seeing the conditions existing, ordered the military to Onancock to preserve public peace and to prevent the recurrence of further rioting, and to protect the property and lives of the citizens of the town of Onancock, including particularly the life of your petitioner.

"(4) That, notwithstanding the presence of the military at Onancock, your petitioner was compelled to remain in hiding for several days longer, to protect himself from the feeling which had been aroused against him. Finding by inquiry, however, that it was prudent for him to return, he did return and surrendered himself to the officers of the state of Virginia for

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protection, and was brought by a detail of soldiers to the city of Norfolk, Virginia, where he was placed in custody of the sergeant of the city of Norfolk, and has been kept since then, with the consent of the authorities of Accomac county and by direction of the governor of the state of Virginia.

“(5) Your petitioner has been informed that it has been deemed necessary by the authorities of the county of Accomac, since said riot, to keep a portion of the military forces of the state of Virginia at Onancock up to and including the 1st day of September, 1907, for the purpose of preserving public peace and order, so great is the feeling and indignation of the citizens of Onancock towards your petitioner and other persons of his race at Onancock.

“(6) Your petitioner further alleges that so great is the public indignation and feeling in the county of Accomac against him that the judge of this honorable court has deemed it necessary to protect your petitioner from violence to cause the sheriff of Accomac county to summon and carry with him to the city of Norfolk an armed posse of twenty citizens from the county of Accomac, to protect your petitioner and others from violence of the citizens of said county of Accomac, and he was, on September 5, 1907, brought back from the city of Norfolk, Va., to the said county of Accomac by said armed body of citizens, and was by them placed in the jail of said county and there guarded in the said jail all night, and he was, on the 6th day of September, 1907, brought into your honor's court, closely guarded by said posse of armed citizens in order to afford him the protection to which he is entitled by law, and he is now being guarded by said posse. Reference is here made to said order and the same is asked to be read as a part of this petition, the same having been entered September 2, 1907. Your petitioner further states, that, though the military were withdrawn from the county on Sunday, September 1, 1907, as aforesaid, and the said order of the court was entered the next day, directing the *posse comi-*

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*tatus* to be summoned, and the said posse has been substituted for said militia, yet the governor of Virginia has deemed it necessary to send the adjutant general of Virginia to this county on September 2, to observe and be in touch with the situation here, and the said adjutant general is here in court at this time to be in readiness to recall military forces promptly, should the emergency require it.

“(7) That under the facts above stated, and which are facts, your petitioner alleges that it will be impossible for him to have a fair and impartial trial, as he is in law entitled to receive.

“(8) Your petitioner further alleges that, under section 4036 of the Code of Virginia, as amended by an act approved March 5, 1904, he is entitled, as a matter of right, to have the venue changed in this trial, because of the fact that the mayor of the town of Onancock and the sheriff of the county of Accomac have called on the governor of this state for military force to protect your petitioner from violence, and that, even though the military has been removed from the county of Accomac, the judge of this court has deemed it necessary to call a posse of armed men to aid the sheriff in removing your petitioner in safety to the county of Accomac and protect him while being tried, thus substituting one for the other.

“(9) Your petitioner further states that, up to this time he has been so confined in jail and the public feeling is so great against him that he has been unable to procure affidavits in support of this petition, and prays that this may be taken and treated as his affidavit in support of the same.

“Your petitioner, therefore, prays that your honor will order the venue of this cause to be changed to some other circuit court or to some corporation or hustings court of one of the cities of this state, remote from the place where the offence set out in said indictment was alleged to have been committed, in order to insure your petitioner a safe and impartial trial.

“JAS. D. UZZLE.

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"The foregoing petition and the facts stated therein were subscribed and sworn to before me by James D. Uzzle in my office, this 6th day of September, 1907.

"JOHN D. GRANT.

"Clerk of the Circuit Court of Accomac County.

"Whereupon the court stated that it did not desire to hear testimony from either side, and declined to hear the same, and overruled the motion for a change of venue, to which action and ruling of the court the prisoner excepted and tendered this, his bill of exception, which is signed, sealed, enrolled and ordered to be made a part of the record."

The order of the court referred to in the petition, and made a part thereof, is as follows:

"And on this same day" (the day on which the indictment was found), "to-wit: At a circuit court held for the county of Accomac, on Monday, the 2nd day of September, A. D., 1907.

"The Commonwealth, Plaintiff.

against

Samuel L. Burton, Defendant.

On an Indictment for Felony.

Same, Plaintiff, ,

against

Sylvanus Conquest, Defendant.

On an Indictment for Felony.

Same, Plaintiff,

against

James D. Uzzle, Defendant.

On an Indictment for Felony.

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"The court being aware of recent disturbances arising from the occurrences connected with offences for which the above-named parties stand indicted, and knowing that all of the above-named parties are now in Norfolk jail for safe-keeping, and that the militia of this state have recently been withdrawn from this county, therefore, that the ends of justice may be attained, and that the said parties may have a fair, free and impartial trial, without their personal safety being in any way endangered, or the dignity of this tribunal being impaired, and to maintain the fair name and fame of this county, it is hereby ordered that a *posse comitatus* consisting of the following named persons: George C. Walker, Leonard O. Ames, Leonard C. Mears, George T. Coleburn, William F. B. Mapp, Leroy J. Bull, William R. Jones, Rufus W. Harding, Levin J. Melson, John S. Parsons, Wells R. Rew, Maurice L. Lewis, George B. Finney, James H. Miles, William J. Singleton, J. Walker Eichelberger, Richard A. Turlington, J. Wesley Coleburn, Roy D. White and L. L. Lilliston, selected by the court, after consultation with the sheriff and the attorney for the commonwealth and other discreet citizens, do proceed with the said sheriff and such deputies as he may desire, to the city of Norfolk, at such time as he shall deem safe and proper, take the said above-named defendants into their custody and safe-keeping and fully protect them from any violence whatsoever, and have them before this court at 10:30 A. M., on Friday next, and continue their protection in the court-house and further till discharged by order of this court."

The bill of exception shows that the accused asked to be permitted to prove the facts alleged in his petition; that the commonwealth offered to introduce evidence to show that the military referred to in the petition was not called or asked for by the authorities of the town of Onancock or the county of Accomac; and that the court refused to hear the testimony of either.



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As the commonwealth only sought to introduce evidence to sustain its denial that the military were called for by the authorities of the said town or county, the other allegations of fact at least, made in the petition, must be considered as true upon the application for a change of venue, since the commonwealth did not ask to controvert them by proof, and the accused was not permitted to offer evidence to sustain them.

Under the provisions of section 4036 of the Code, as amended by an act approved March 15, 1904, (Acts 1904, p. 307), the venue for the trial of a criminal case may be changed upon the motion either of the accused or of the attorney for the commonwealth, or without such motion for good cause; or the accused may have it changed as a matter of right upon petition signed and sworn to by him, whenever the mayor of any city or the sheriff of any county shall call on the governor for a military force to protect the accused from violence.

It is insisted by the attorney-general that the accused was not entitled to a change of venue for good cause, even if such cause had been shown, which is denied; because a change of venue for cause can only be asked for and had after application has been made that jurors be summoned from another county or corporation for his trial.

If this be true, it will be unnecessary to consider further the question, whether or not the accused showed "good cause" for a change of venue, as it is not contended that any such motion preceded his application for a change of venue.

It is well settled that, where an application for a change of venue is based simply on the ground of difficulty in obtaining jurors in the county or corporation free from exception, it must be preceded by an application to summon jurors beyond such county. *Wright's Case*, 33 Gratt. 880; *Joyce's Case*, 78 Va. 287. But, where the application for a change of venue is based upon the ground that there exists such prejudice and excitement against the accused as to endanger the fairness and impartiality

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of a trial conducted in the county, then the rule of practice invoked by the attorney-general does not and ought not to apply. It is true that the judge delivering the opinion of the court in the case of *Waller & Boggs*, 84 Va. 492, 496, 5 S. E. 364, stated that "as this court has repeatedly held, this motion" (that is, for a change of venue) "should have been preceded by a motion for a change of *venire*; and this not having been done, and an impartial jury having in fact been obtained in the county, the conclusive presumption is that the motion for a change of venue was unfounded." The only authorities cited to sustain that statement were the cases of *Wright* and *Joyce*, *supra*. Neither of those cases involved the question we are now considering, as the motion for a change of venue in each of them was based upon the ground that an impartial jury could not be obtained in the county.

The case of *Bowles*, 103 Va. 816, 48 S. E. 527, is also cited by the attorney-general to sustain his contention. In that case what is said upon the subject (p. 823) was merely by way of argument to show that no such local prejudice or excitement existed in the county as to require a change of venue; and it does not hold, as we understand it, that an application for a change of venue must be preceded by a motion to have a jury summoned from another county. The statute makes no such requirement, and there is no reason why the court should do so. Why should the accused be compelled to ask for what he does not wish as a condition precedent to an application for what he does wish and is entitled to under the statute if he shows good cause?

The reason why the practice is different in a case where the application for a change of venue is based upon the ground that a *fair and impartial jury* cannot be obtained in the county, and where it is based upon the ground that a *fair and impartial trial* cannot be had in the county because of the local prejudice and excitement therein against the accused, is clearly and strongly

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stated by Judge Daniel, in delivering the opinion of the court in *Wormley's Case*, 10 Gratt. 658, 672-674, which was tried soon after the statute was passed authorizing the circuit courts to summon juries from counties other than that in which the accused was being tried, under certain circumstances. After referring to the fact that formerly, when a jury free from exception could not be obtained in the county where the accused was to be tried, a change of venue was necessary, because as the law then stood, the court had no authority to send beyond the limits of the county for a jury, no matter what might be the difficulty in obtaining a jury therein free from exception, the learned judge says: "In this state of the law, it is difficult to suppose a case in which this court could safely undertake to pronounce erroneous a judgment of a circuit court refusing an application for a change of venue, based simply on the ground of difficulty in obtaining jurors for the trial in the county. Cases, however, may be supposed of such strong and extensive and influential prejudice and excitement against the accused, as to endanger the fairness and impartiality of a trial conducted in the county, even though the court should encounter no serious difficulty or inconvenience in obtaining a jury. In such cases, in order to obtain a full, free, dispassionate, just and impartial hearing of the cause, it might be just as important to change the theatre of the trial, as to have a jury filling all the requirements of the law as to qualification and freedom from exception. In view of such a possible state of things, and of the possible existence of other causes not necessarily connected with the jury, and in order to preclude the inference that, by enlarging the power of the court as to the sources from which the jury might be taken, it intended to curtail the court of any power or discretion which it previously had of changing the venue for causes other than the difficulty of obtaining a jury in the county, the legislature have, in the 22nd section of the

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chapter cited above," (Ch. 208, Code of 1849), "declared that the circuit courts may, on the motion either of the accused or of the attorney for the commonwealth, or without such motion, *for good cause*, order the venue for the trial of a criminal case in such court to be changed to some other circuit court."

After careful consideration of the facts alleged in the petition for a change of venue, and which must be taken as true, except as hereinbefore indicated, the court is satisfied that the accused showed good cause for a change of venue, and that it ought to have been granted.

It appears that the white people of the county were so greatly aroused against the accused, and that the relations between the races were of such character that it required the promptest and most vigorous action of the executive officers of the state, from the governor down, including the military and the *posse* furnished the sheriff by the court, to preserve the public peace, and to protect the accused and other members of his race from mob violence; that this state of feeling continued down to and through the trial of the accused; and that after the conviction of the accused, he had to be confined in the jail of another county, pending his efforts to have the judgment of the trial court reversed. Under these circumstances, it is not only highly probable but almost certain that the accused did not have that fair, dispassionate and impartial trial which every accused person is entitled to under the law.

Having reached the conclusion that "good cause" was shown by the accused for a change of venue, and that the trial court erred in not so ordering, it is unnecessary to consider whether or not he was entitled to a change of venue as a matter of right, under the amendment made to section 4036 of the Code by the act of March 15, 1904.

It is also unnecessary to consider the other errors assigned, as some of them cannot and the others will not probably arise upon the next trial.

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The judgment of the circuit court will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, with direction to the circuit court to order the venue to be changed to the corporation court of the city of Norfolk, without carrying the accused back to Accomac county.

*Reversed.*

Opinion.

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**Richmond.**

BURTON & CONQUEST v. COMMONWEALTH.

January 23, 1908.

1. This case is controlled by *Uzzle v. Commonwealth*, ante, p. 919.

Error to a judgment of the Circuit Court of Accomac county.

*Reversed.*

The opinion states the case.

*Thomas H. Willcox* and *J. L. Jeffries*, for the plaintiffs in error.

*Robert Catlett*, Assistant to Attorney-General, and *S. James Tunlington*, for the commonwealth.

BUCHANAN, J., delivered the opinion of the court.

The first error assigned in this case is to the refusal of the trial court to order a change of venue for the trial of the plaintiffs in error, who were indicted for murder.

Upon the question of a change of venue, the facts of this case and that of *James D. Uzzle v. Commonwealth*, ante, p. 919, in which the opinion of the court has just been handed down, are, as was conceded in oral argument, substantially the same. In that case the court was of opinion that the trial court erred in not ordering a change of venue, and that its judgment must

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therefore be reversed, the verdict set aside and the cause remanded for a new trial.

For the reasons stated in that opinion, without passing upon the other assignments of error, the judgment in this case must be reversed, the verdict set aside, a change of venue ordered, and the cause remanded for a new trial.

*Reversed.*

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**Richmond.**

SCOTT v. CHICHESTER, SERGEANT, ETC.

January 23, 1908.

1. CRIMINAL LAW—*Suspension of Sentence—Parole—Violation—Computation of Time—Increased Punishment.*—A prisoner serving a jail sentence cannot be paroled by the judge of the court during good behavior, and upon default remanded to jail to serve out the original term of his confinement, without counting the period during which he was out on parole. There is no law in this state authorizing such a practice. During the period of his parole he is morally and actually under the restraint of his parole, and under the orders of the jailor. To exclude the time while out on a parole, would be, for same offence, to impose upon the prisoner another and additional punishment to that originally pronounced.

Error to a judgment of the Corporation Court of the city of Fredericksburg.

*Reversed.*

The opinion states the case.

*Carter & Carter* and *F. W. Coleman*, for the plaintiff in error.

*G. R. Swift*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

George Scott, *alias* Dinkey Scott, filed a petition in the corporation court of the city of Fredericksburg, complaining that



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he was unlawfully detained in the custody of J. C. Chichester, sergeant of said city, and praying for a writ of *habeas corpus* from that court, which was awarded; and upon the answer of the sergeant being filed, the court refused to discharge the prisoner and remanded him to the custody of the sergeant. To that judgment this writ of error was awarded.

From the answer of the sergeant of the city of Fredericksburg it appears, that on the 21st day of March, 1907, the prisoner was sentenced in the corporation court of the city of Fredericksburg to a term of eight months in the jail of that city, for an unlawful assault; that on the 10th day of August following, counsel for the prisoner moved the court to suspend the sentence and judgment against the prisoner, and upon the hearing of this motion, the court granted it, and allowed the sergeant (who is the jailor) of the city to permit the prisoner to leave the confines of the prison and to go at large; the motion being granted, it would seem, because the prisoner's health required that he should be permitted to have fresh air and out-door exercise; that on the 28th of October, 1907, the prisoner was tried before the mayor of the city of Fredericksburg on a charge of fighting, and was found guilty and sentenced to pay a fine of five dollars and the costs of the prosecution, which he immediately paid, and upon the suggestion of the attorney for the commonwealth, that the prisoner was out of jail on probation, he was by the mayor remanded to jail to await the action of the corporation court; that on the 1st day of November the prisoner was brought before the corporation court of the city of Fredericksburg and placed at bar in the custody of the sergeant, and his counsel moved the judge of the court to rehear the evidence before the mayor on which the prisoner had been convicted by the mayor; but this motion was either withdrawn or the court refused to consider it, except in the nature of an appeal from the decision of the mayor's court, and upon the hearing it was held that the prisoner "had violated the terms

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of his parole of August 10, remanded the prisoner back to jail in charge of the sergeant to serve out the residue of his term of imprisonment of March 21, 1907, where he has since been and is now kept in obedience to the order of the judge of the corporation court given in open court."

The term of imprisonment in the jail of the city of Fredericksburg for eight months, as above stated, began on the 21st day of March, 1907, and expired at 12 o'clock, midnight, on November 20, 1907; therefore, if he was not legally restrained from and after 12 o'clock, midnight, November 20, 1907, he was entitled to his discharge from custody, and the corporation court of the city of Fredericksburg erred in the judgment complained of.

The only ground upon which the court rests its ruling in refusing to discharge the prisoner is, that he was only out of the custody of the jailor from August 1907, to October 28, 1907, on parole, and therefore, the court had a right to remand him to the custody of the jailor to serve out the full term of eight months prescribed in the sentence of March 21, 1907; in other words, it is not claimed that there is any law authorizing the action of the corporation court, but it is based solely upon a practice which seems to have prevailed in that court of paroling prisoners confined in jail upon their good behavior, and for default on the part of the prisoner, he is remanded to jail to serve out the original term of his confinement, without counting the period during which he was out of the custody of the jailor on parole.

No one can be confined in prison in this commonwealth, except by authority of law, and the practice shown by this proceeding cannot be too severely condemned. The result of the practice in this case is, that the prisoner was sentenced to serve another and additional punishment than that pronounced upon him on March 21, 1907, for instead of eight months' confinement in jail, he would suffer for the same offence eight months'

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confinement in jail, and, for the period between August 10 and October 28, 1907, partial confinement, while physically out of jail, but morally and actually under the restraint of his parole, and under the orders of the jailor.

It is true that, where a prisoner wrongfully escapes from jail during his term of confinement and is taken, he may be made to suffer actual confinement beyond the time when his sentence expires, if it run continuously for a period of time equal to that during which he was wrongfully at large; and the reasoning for this is, that a man shall not be permitted to take advantage of his own wrong. *Cleek v. Com'th*, 21 Gratt. 777. But that is not this case, for here there was no "escape," no "wrong," or any offence committed by the prisoner of which he seeks to take advantage; and the very terms of the parole upon which he was not actually confined in the jail of the city of Fredericksburg between August 10 and October 28, 1907, were that if for any reason the prisoner was returned to jail, it would be to serve out the "balance of his term"—that is, the term of eight months, which expired at midnight on November 20, 1907.

In *Ex parte Lange*, 85 U. S., 21 L. Ed. 872, while the court recognizes the general principle asserted as applicable to both civil and criminal cases, that the judgments, orders and decrees of the courts of this country are under their control during the term at which they are made, so that they may be set aside or modified as law and justice may require, the opinion holds that even this power cannot be so used as to violate the guaranties of personal rights found in the common law and in the constitutions of the states and of the Union. "If there is anything settled in the jurisprudence of England and America, it is that no man shall be twice punished by judicial judgments for the same offence."

In this case it clearly appears from the answer of the sergeant of the city of Fredericksburg, that the detention of the prisoner in the custody of the sergeant after the expiration of his

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sentence of confinement, which expired at midnight on November 20, 1907, is illegal and void; and, therefore, the corporation court erred in not discharging the prisoner therefrom, and its judgment will be reversed and annulled, and this court will enter the order that the corporation court should have entered, discharging the prisoner from custody.

*Reversed.*



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ACCOUNTS. See INJUNCTIONS 1.

## ADVERSE POSSESSION.

1. *Color of Title—Deed from One Tenant in Common.*—A stranger who takes a conveyance of the whole estate in a tract of land, and, in pursuance thereof, enters into the exclusive possession thereof, claiming title to the whole, and occupies, uses and enjoys the same adversely, openly, and notoriously for the statutory period, acquires title to the whole land, although the grantor may have owned only an undivided interest therein. He is not a tenant in common with others who owned the land jointly with his grantor, and they cannot maintain a suit in equity against him for the partition of the same. *Preston v. Va. Mining Co.*, 245.
2. *Hostile Claim—Possession Taken by Mistake.*—In this case, land was conveyed to school trustees in 1873 for school purposes, and they erected a school house thereon, and a few years thereafter the alienee of the grantor of the residue of the tract enclosed it, and, by mistake, cut off with the school-house lot more land than was conveyed to the trustees; and the trustees, holding the legal title to the land and the right to the possession thereof, gave permission to a religious congregation to worship there, and also to erect a church and bury their dead on the school-house lot. The congregation, intending to confine themselves to the school-house lot, erected a church on the lot, but, in doing so, encroached upon the land cut off as aforesaid by mistake, and also buried some of their dead thereon, about eight years before the institution of this suit. All that was done upon the lot by the congregation was after permission first obtained from the school trustees. The alienee of the grantor of the residue of the original tract had his land surveyed shortly before the institution of this suit, and discovered the above-mentioned mistake, and notified the congregation that he claimed all the land not included in the grant to the school trustees. This suit was then brought by the trustees of the congregation to quiet their title to the whole lot cut off, claiming title by adverse possession, and to enjoin said alienee from disturbing their possession. The school trustees were made parties defendant, and they disclaimed all title to any of the land except that originally conveyed to them. The Circuit Court dismissed the bill of the complainants.

**Held:** The complainants' right of possession is subordinate to and dependent upon the right of possession of the school trustees, who disclaim title to the land in controversy, and they have not title by adverse possession. First, because not of sufficient duration, and second, because possession taken by mistake, and not under a claim of right, cannot ripen into adverse possession, and hence their bill was rightly dismissed. *Davis v. Owen*, 283.

3. *Land lying in two States—Forfeiture of Part.*—The forfeiture of part of a tract of land lying in West Virginia, under the laws of that state, cannot affect a tenant's claim by adverse possession to the residue of the tract lying in this state. *Marryman v. Hoover*, 485.

4. *Lands subject to Ebb and Flow of Tide.*—It is doubtful if title by adverse possession can be acquired of land over which the tide ebbs and flows, separate and distinct from the rights of the riparian owner. In the case of wild land, it is held that, in order to acquire title by adverse possession, there must be some change in their physical condition as a visible evidence of occupation and ownership, and it would seem that the same rule should apply to land under water, subject to the ebb and flow of the tide. *Austin v. Minor*, 101.

5. *Marsh Lands—Case in Judgment.*—If the marsh lands in controversy in this case are capable of such enjoyment as, accompanied by a claim or color of title, would ripen into a good title, there has been no such use and occupation of them by any one as is necessary to constitute adverse possession, which must, to constitute good title, be open, notorious, exclusive, continuous and adverse. *Austin v. Minor*, 101.

**AFFIDAVITS.** See ATTACHMENTS, 1, 2; NEW TRIAL, 1; TRUSTS AND TRUSTEES, 1.

**ALTERATION.** See APPEAL AND ERROR, 18; EVIDENCE, 22.

**AMENDMENTS.** See EQUITY, 4, 5.

#### **APPEAL AND ERROR.**

1. *Amount in Controversy—Taxes.*—A tax is nothing more than a debt due by the citizen to the taxing power, and unless the right to impose the tax or the construction of the statute under which it is imposed is called in question, or necessarily passed upon in the trial court, no appeal lies to this court from the judgment of the trial court imposing a tax, if the aggregate amount of the tax imposed is less than three hundred dollars. *Schermerhorn v. Commonwealth*, 707.

2. *Assignment of Error.*—A petition for a writ of error is sufficient if the points upon which reliance is had for a reversal are clearly

stated and leave no doubt as to the questions presented for consideration, although it does not specifically state that the ruling of the trial court on this point or on that is assigned as error. *Norfolk & W. R. Co. v. Bondurant*, 515.

3. *Attachments—Amending of Affidavit.*—Courts acquire jurisdiction of attachments in equity alone by force of the affidavit; and, upon appeal, in a case founded upon an insufficient affidavit, this court can only abate the attachment and dismiss the proceeding, in the absence of an application to the trial court to amend the affidavit. In the absence of statute, it cannot remand the case to the trial court for the purpose of amending the affidavit. *Taylor v. Sutherland-Meade Co.*, 787.
4. *Constitutionality of Law—How Raised.*—Notice under section 3451 of the Code to reverse a judgment by default, and to quash an execution thereon, on the ground that "judgment was obtained by default and after service of process by publication only, and not by personal service thereof," sufficiently raises the constitutionality of section 3225, under which the service was made. Any proceeding which necessarily puts in issue the constitutionality of a statute, whether it be by demurrer, plea, instruction or otherwise, is sufficient to give this court jurisdiction of the case, regardless of the amount involved. *Ward L. Co. v. Henderson White Co.*, 626.
5. *Constitutional Question as Ground of Jurisdiction.*—Where the trial court has held an act of assembly to be constitutional, and the only ground of appeal to this court is the unconstitutionality of the act, if this court finds the act to be constitutional, that is the only question it can consider under the express mandate of the Constitution. *West. U. Tel. Co. v. Chiles*, 60.
6. *Contempts—When no Writ of Error Lies.*—No writ of error lies from this court to a judgment of an inferior court imposing a fine upon a party to a suit for disobedience of its orders, and directing his imprisonment in jail in default of the payment of said fine. Such judgment is not within the purview of section 4053 or of any other section of the Code. The theory seems to be that if the order disobeyed is erroneous, the parties affected should appeal. If it is right, it should be obeyed. *Forbes v. State Council*, 853.
7. *Correct Verdict—Ruling on Instructions.*—Where it plainly appears that the verdict of the jury could not have been other than it was, this court will not consider the ruling of the trial court in granting or refusing instructions. *Hanger v. Com'th*, 872.
8. *Disqualification of Judge—Evidence—Presumption.*—The entry of record, required by statute, of the inability of a judge to sit in a case, is not an order or decree in the case, and the failure of the transcript of the record for an appeal to disclose such an entry is no evidence that the entry was not made, although certified by the clerk to be "a true and correct transcript and copy of all papers, evidence, certificates, orders and decrees as appear of record



in my office." Where the court is one of general jurisdiction, having jurisdiction of the subject matter and the parties, and the presiding judge is one authorized to sit in the place of the disqualified incumbent, it will be presumed that the presiding judge acted under proper authority if the contrary does not affirmatively appear of record. *Smith v. White*, 616.

9. *Divided Court—Affirmance—Rule of Necessity.*—The affirmance of the judgment of a trial court by an equal division of the judges of this court results from necessity, and independently of statute. The former statute in this state on that subject was simply declaratory of a well settled pre-existing rule of necessity which is not changed by the omission from the present statute of anything on the subject. *Charlottesville R. Co. v. Rubin*, 751.
10. *Effect of Appeal on Rights of Parties not Appealing.*—Under the statute of this state and the rule of this court, the rule of decision is that where the parties stand on distinct and unconnected grounds, where their rights are separate and not equally affected by the same decree or judgment, the appeal of one will not bring up for adjudication the rights or claims of the others. But where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same judgment or decree, this court will consider the whole case, and settle the rights of the parties not appealing as well as those who bring up their case by appeal. *Roanoke v. Blair*, 639.
11. *Failure to Certify Evidence—Instructions—New Trial.*—Objection to the action of a trial court in granting instructions, or in overruling a motion for a new trial, cannot be considered by this court when the evidence has not been certified. *Blackwood Coal Co. v. James*, 656.
12. *Final Judgment—Exception to Ruling of Trial Court.*—An order refusing to admit to probate a paper offered as a will, is a final judgment to which a writ of error lies, although no provision is made for the costs of the proceeding in which the will is offered; and an exception to the action of the court, refusing to set aside the verdict of the jury and grant a new trial of the issue as to whether or not the paper offered was the true last will and testament of the testator, is sufficient to enable the propounder of the paper to maintain a writ of error, although no formal exception was taken to the judgment of the court refusing to admit the paper to probate. *Wallen v. Wallen*, 131.
13. *Harmless Error—Bill of Particulars.*—The refusal of the trial court to require a defendant to file a statement of his grounds of defense is not assignable error here, where it appears that the defenses relied on were distinctly developed at the trial, the greatest latitude allowed the parties, and that the plaintiff could not have suf-

- ferred any injury by the refusal of the court to require such statement to be filed. *Wallen v. Wallen*, 131.
14. *Instructions—Objections not made in Trial Court.*—This court cannot consider an objection to an instruction given by the trial court, when the objection was not saved by proper exception. The objection cannot be made in this court for the first time. *Wallen v. Wallen*, 131.
15. *Invited Error.*—A party will not be permitted in this court to complain of an error committed in the trial court into which he invited the court, especially if it did him no injury. *Bugg v. Seay*, 648.
16. *Jurisdiction of Court of Appeals—How Conferred.*—The jurisdiction of this court is limited, and is prescribed by the constitution of the state and the laws passed in pursuance thereof, and the burden is upon him who invokes its authority to establish its jurisdiction over the matter in controversy. *Forbes v. State Council*, 853.
17. *Objections for the First Time—Disqualification of Judge—Evidence—Clerk's Certificate.*—The objection that a judge of a circuit court of a circuit adjoining that in which the suit was brought, or that a city judge presided at the hearing of a cause without designation by the governor, as required by statute, cannot be made for the first time in this court; nor can the fact that the resident judge failed to enter of record his disqualification to sit be made to appear by the certificate of the clerk of the non-existence of such an entry. Such certificate is no part of the record. The custodian of documents and records cannot establish their non-existence in his office by his certificate to that effect, but must be sworn and examined as any other witness. *Smith v. White*, 616.
18. *Objections not made until after Verdict—Reversal on other Grounds.*—Whether or not detaching a negotiable note from an agreement annexed to it, and qualifying its terms, and bringing suit on the note alone, is such an alteration as avoids the contract, ought not now to be considered by this court in this case, as it appears that the question was not raised in the trial court until after verdict against the makers, and the case is reversed and remanded for a new trial on other grounds. *Nottingham v. Ackiss*, 63.
19. *Parties.*—A widow who has not renounced her husband's will has no interest in land devised by him solely to his children, and cannot appeal from a decree adverse to the interest of the children, although a party to the suit in which the decree was rendered. *Givens v. Clem*, 435.
20. *Record—Instructions—Bills of Exception.*—Instructions not made a part of the record by a proper bill of exception in the trial court cannot be considered by this court. *Knights of Columbus v. Burroughs*, 671.

21. *Reviewing Rulings on Immaterial Evidence—Correct Verdict.*—Where it appears that there was no sufficient reason for a pedestrian's leaving the sidewalk and walking in an adjacent paved gutter, and the jury have rightly so found under instructions from the court, this court will not undertake to review the rulings of the trial court in rejecting evidence offered by the plaintiff, as to the city's having repaired the place in the gutter where the plaintiff was injured, or that others had fallen into the same or similar openings in the gutter. As there could have been no other verdict rightly found than what was found, the proffered evidence was immaterial. *Mitchel v. City of Richmond*, 193.
22. *Rulings on Instructions—Correct Verdict.*—It is unnecessary to consider the rulings of the trial court in giving and refusing instructions, when, under proper instructions as applied to the facts of the case, a different verdict could not have been rightly found by the jury. *Brouder v. Southern R. Co.*, 10.
23. *Termination of Controversy—Moot Questions.*—Whenever it appears, or is made to appear by extrinsic evidence, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, the appeal or writ of error should be dismissed. Courts of justice sit to decide actual controversies by a judgment which can be enforced, and not to give opinions upon moot questions or abstract propositions of law. *Hamer v. Commonwealth*, 636.
24. *Want of Jurisdiction—Expressions of Opinion—Contempt.*—Where no writ of error lies from this court to the judgment of an inferior court imposing a fine on a party for a contempt of its judgment, the decision of the trial court that the acts of such party amount to a contempt is final, and this court will not intimate any opinion upon the subject. *Forbes v. State Council*, 853.

See CRIMINAL LAW, 3; INFANTS, 1; RES JUDICATA, 1, 2.

ARGUMENT OF COUNSEL. See TRIAL, 1.

ARREST. See CRIMINAL LAW, 1.

#### ASSIGNMENTS.

1. *Contest Between Assignees—Notice—Legal Title.*—As between two *bona fide* assignees for value of an insurance policy, the second assignee will be preferred where it appears that he not only took his assignment in good faith and for full value and without notice or knowledge of the prior assignment, but also gave notice of his assignment in writing to the insurer, and was recognized and accepted by it in writing as such assignee, and acquired the complete legal and equitable title to the policy; whereas, the first assignee did not even know of the existence of his assignment and hence

took no steps to protect his interest. Where equities are equal, the law will prevail. *Coffman v. Liggatt*, 418.

2. *Delivery—Case in Judgment.*—In order to constitute a valid assignment of a chose in action, the assignor must part with his power of control over it, and the evidence of the assignment must be so delivered as to be irrevocable by the assignor. In the case in judgment, the evidence does not establish a delivery of either the chose in action or of the assignment thereof. *Coffman v. Liggatt*, 418.

See ESTOPPEL, 1.

ASSUMPSIT. See PLEADING, 4.

#### ATTACHMENTS.

1. *Affidavit—Treasurer as Agent of Corporation.*—The fact that a statute authorizes service of process against a corporation on its treasurer is not a recognition of the treasurer as the representative of the corporation in all legal proceedings. *Taylor v. Sunderlin-Meade Co.*, 787.
2. *Affidavit by Secretary and Treasurer of Corporation—Agent.*—An attachment awarded to a corporation as plaintiff, based upon the affidavit of its secretary and treasurer, as such and without more, cannot be maintained. The court cannot say, as a matter of law and in the absence of averment, that the term "secretary and treasurer" necessarily imports the relation of agency between such officer and his corporation within the intendment of the attachment laws of this state, which require the affidavit to be made by "the plaintiff, his agent or attorney." If he is in fact such agent, it should be so averred in the affidavit. Attachment laws being in derogation of the common law, and harsh in their application, substantial compliance with their requirements must be made to appear on the face of the proceedings. *Taylor v. Sunderlin-Meade Co.*, 787.

See APPEAL AND ERROR, 3.

ATTEMPTS. See CRIMINAL LAW, 2, 3.

#### ATTORNEY AND CLIENT.

1. *Attorney's Lien.*—Attorneys have no lien upon property placed in their hands for a special purpose which is inconsistent with or adverse to the claim of such a lien. *Watts v. Newberry*, 233.
2. *Counsel Fees—Allowance out of Fund—When to be Refused.*—Except in rare instances, the power of the court to require one party to contribute to the fees of the counsel of another party, must be confined to cases where the plaintiff, suing in behalf of himself and

others of the same class, discovers or creates a fund which enures to the common benefit of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose fund is sought to be charged, are antagonistic to the party for whose benefit the suit is prosecuted. The case in judgment belongs to the latter class, and fees were properly refused. *McCarmick, v. Elsea*, 472.

#### BANKRUPTCY.

1. *Fraudulent Conveyance—Participation by Creditor.*—Under Sec. 67e of the Bankrupt Act the debtor's intent and purpose alone governs in determining whether a conveyance was made with intent to hinder, delay or defraud his creditors. The creditor preferred need not participate in this intent and purpose in order to render the preference void. The Bankrupt Act was intended to afford relief where the common law and the state statutes against fraudulent conveyances afforded none. *Webb v. Lynchburg Shoe Co.*, 807.
2. *Preferences.*—The purpose of the Bankrupt Act was to relieve the bankrupt from his debts and to secure an equal division of his assets among his creditors, and to this end to provide a remedy against every act by which a failing debtor seeks an unequal distribution of his assets among his creditors. Every such act is condemned as being against the spirit and purpose of the bankrupt law. *Webb v. Lynchburg Shoe Co.*, 807.

#### BENEFICIAL ASSOCIATIONS.

1. *Forfeitures—Irregular Payment of Dues by Local Council—Case at Bar.*—The by-laws of a benefit society provided that any member shall *ipso facto* forfeit his membership who failed, neglected or refused to pay his assessments within a time specified in the by-law. They also provided that no money should be paid or transferred from the treasury of any council except upon a two-thirds vote of the members present and voting at a regular meeting held after notice at a previous meeting of an intention to pay or transfer such money. A local or subordinate council kept alive the membership of all its members by paying their dues by checks drawn by the financial secretary on the treasurer against the insurance fund, but not in accordance with the by-law last above mentioned. A member of a local council, whose dues and assessments had been thus paid, had failed to pay his assessments for six months, though notified, on an average, twice a month. Some time afterwards he became ill, and four days before his death there was paid to the financial secretary of the local council the full amount of all dues and assessments theretofore advanced for him by the local council. Upon his death, the society refused to pay the amount of his policy on the ground that his policy was forfeited by reason of his failure to pay his dues and assessments within the time required by the by-laws.

*Held:* There can be no recovery on the policy. The member, by failing to pay his assessments as required by the constitution and by-laws *ipso facto* forfeited his membership in the society. The subordinate local council, in undertaking to make good the delinquencies of its members, by warrants drawn by its financial secretary on the insurance fund, without complying with the by-laws of the society, acted without authority; that in so doing it was the agent of its members, and not of the society, and the society having received the money in ignorance of the facts, has not waived the forfeiture, and is not by its conduct estopped to set it up in defense to this action. *Knights of Columbus v. Burroughs*, 671.

2. *Membership—Forfeitures—Notice of By-Laws.*—A party who takes out a policy in a mutual benefit society becomes a member of the society, and is bound by the rules and provisions of its charter and the by-laws lawfully made in pursuance thereof, and is conclusively presumed to have knowledge of them all. If these provide that the non-payment of dues and assessments for a specified time after notice shall *ipso facto* forfeit his membership in the society, the provision is binding on him, and, if not waived, no further steps on the part of the society are necessary to render the forfeiture effective. *Knights of Columbus v. Burroughs*, 671.
3. *Non-Payment of Dues—Forfeiture.*—The non-payment of dues and assessments in a beneficial association organized for the purpose of fraternal insurance, and not for gain or profit, tends to the destruction of the association, and is a violation of the member's duty as a corporator. Not only has the association an inherent right to expel members for non-payment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws that such non-payment, within a specified time after notice, shall, without personal or other notice to the delinquent member, *ipso facto*, work a forfeiture of all the members' rights of membership. *Knights of Columbus v. Burroughs*, 671.

BILL OF PARTICULARS. See APPEAL AND ERROR, 13.

#### BILLS OF EXCEPTION.

1. *Skeleton Bill—Identification of Evidence.*—A trial judge cannot sign a skeleton bill of exception and direct the clerk to insert all the evidence introduced on both sides "as appears from the stenographer's report thereof." The evidence inserted must be, in some way, identified or ear-marked by the judge under his own hand. Otherwise it is no part of the bill and cannot be considered by an appellate court. The making of a bill of exception is a judicial act, and cannot be delegated. *Blackwood Coal Co. v. James*, 656.
2. *When to be Filed—Consent of Record.*—Under the provisions of section 3385 of the Code of 1904, the consent of counsel that bills of exception may be signed after the lapse of thirty days from the ad-

journalment of the term at which an opinion of the court is announced to which exception is taken, must be entered of record as a part of the final order of the court in the cause, else the exception is not well taken, and the bill is no part of the record. The court cannot, on the mere motion of the exceptor, and without such consent entered of record, postpone from term to term the signing of such bills. A memorandum signed by counsel on both sides, and annexed to bills of exception filed several terms thereafter, to the effect that such bills of exception "have been examined and agreed to," is not sufficient. The signing of bills of exception so as to make them a part of the record is a judicial act of purely statutory origin, and the provisions of the statute must be strictly observed. *Battershall v. Roberts*, 269.

3. *When to be Signed—Appeal and Error.*—Bills of exception not signed at the term at which the opinions and judgments of the court excepted to were announced, or in the vacation of said court within thirty days thereafter, or at any time at which the parties by consent entered of record at said term had agreed they should be signed, but signed at a subsequent term of said court, are not taken according to the statute, and cannot be considered by this court. *Midgett v. Com'th*, 846.

See CRIMINAL LAW, 4.

#### BILLS AND NOTES.

1. *Collateral Agreement in Separate Paper—Construction—Assignment.*—Where, at the time a negotiable note is made, an agreement in writing is executed by the maker and the payee of the note, which is therein declared to be a part and parcel of the note, by which it is declared that the note is only to be payable on certain conditions, the two writings together constitute the contract between the parties, and if both of them are endorsed by the payee and delivered to a third person, he acquires thereby only such rights as the payee of the note had. *Nottingham v. Ackiss*, 63.

#### BOUNDARIES.

1. *Calls—"East"—Straight Lines.*—The word "East," when used in describing a boundary, means "due East," unless other words are used qualifying that meaning; and where a call is from one point or monument to another, the line is presumed to be a straight line, unless a different line is described in the instrument. *Roanoke v. Blair*, 639.
2. *Corner of Adjacent Tract—Statements Acted On.*—Where it becomes important to establish the location of a corner of a tract of a third person in part adjacent to the lands in controversy, which corner is in the controverted line, the fact that the owner of said tract points out his corner to an agent of one of the parties, who is seek-

ing to establish the true line between the lands in controversy, and that he adopts it and marks it, is relevant evidence when offered against such party, as tending to show the true location of said corner. *Douglas L. Co. v. Thayer Co.*, 292.

3. *Deeds—Description—Street as Boundary—Extent of Grant.*—If the owner of a city lot, which in fact is bounded by a street, conveys the lot without mentioning the street as one of its boundaries, and without manifesting any intention to reserve the street, the legal effect is to invest the grantee with title, subject to the right of way, to the center of the street as effectually as if that boundary had been expressly called for. *Durbin v. Roanoke Building Co.*, 753.
4. *Evidence—Deeds Under Which Parties Claim.*—Where land has been partitioned between two heirs of the former owner, and a part of that assigned to one of the heirs has, through successive conveyances, come to A., and his deed calls for the dividing line between the heir under whom he claims and the other heir as the western boundary of A.'s tract, in a controversy between A. and those claiming under the other heir as to the location of said dividing line, the deed to A. is relevant evidence, as tending to show that those under whom A. holds claimed the location of said dividing line to be the same as now asserted by A. *Douglas L. Co. v. Thayer Co.*, 292.
5. *Evidence—Former Surveys.*—In a controversy over a boundary line, it is admissible to prove that an agent of one of the parties stated that his principal had twice run one of the lines of the tract. It is relevant to show acts done by the party in his effort to locate the lines. *Douglas L. Co. v. Thayer Co.*, 292.
6. *Evidence—Identical Lines of Junior Patent—Newly-Marked Trees.*—Where the lines and corners of a senior patent have become uncertain, a junior patent, calling for these lines and corners, is admissible, and evidence showing the lines of such junior patent may be received for the purpose of identifying the older lines, and also for the purpose of explaining the presence of newly-marked trees in the older lines. *Douglas L. Co. v. Thayer Co.*, 292.
7. *Evidence—Leases.*—In a controversy concerning the boundaries of land, leases not shown to cover any of the land in controversy, or to be otherwise relevant, are not admissible in evidence. *Douglas L. Co. v. Thayer Co.*, 292.
8. *Evidence—Older Patents to Third Persons—Common Designation of Adjacent Tracts.*—The lines of older patents to third persons, which are referred to in a deed of partition between the heirs of an adjacent owner, are relevant evidence to sustain the theory of one of the parties as to the true line between them; and where the patents and deeds in the line of title of the land partitioned refer interchangeably to two tracts in part adjacent to the lands in con-



troversy as the H. and F. land, evidence is admissible to prove that both tracts were sometimes called the H. land. *Douglas L. Co. v. Thayer Co.*, 292.

9. *Evidence—Reputed Corners—Opinion of Witness.*—Parol evidence may be received to prove by general reputation and tradition the location of a corner of a patent more than a hundred years old, but a living witness may not give his individual opinion as to the location of such corner. *Douglas L. Co. v. Thayer Co.*, 292.
10. *Evidence—Surveyor—Reason of Running Line.*—A surveyor who has run a disputed line may, by way of inducement to show why he ran it as he did, testify that it was by direction of counsel of one of the parties given in the presence of the counsel and general manager of the other, who stated that he could "go ahead and run it." *Douglas L. Co. v. Thayer Co.*, 292.
11. *Instructions to Jury.*—In a controversy concerning the dividing line between two parcels of land, both of which had belonged to one person and been divided by commissioners between his heirs, an instruction which ignores the theory of defendants that the parties had acquiesced in the line for which they contended, and, without qualification, yields precedence to the supposed intention of the commissioners, without regard to what they may have done in establishing the line in controversy, is erroneous. *Douglas L. Co. v. Thayer Co.*, 292.
12. *Natural Monuments—Identification—Location of Calls.*—In a controversy over the location of the dividing line between two parcels of land received in the partition of the lands of a common ancestor, where a call in the deed of partition is for a natural monument, witnesses may testify as to the location of the monument and the traditional derivation of its name, in order to identify the monument and locate the call in the partition deed. *Douglas L. Co. v. Thayer Co.*, 292.

#### CANCELLATION OF INSTRUMENTS.

1. *Fraud—Mistake.*—While mistake as well as fraud furnishes ground for rescinding contracts, an executed contract will not be rescinded in either case unless the fraud be satisfactorily established or the mistake be plain and palpable, and affect the very substance of the thing contracted for. *Finch v. Causey*, 124.

See LANDLORD AND TENANT, 1.

#### CARRIERS.

1. *Bills of Lading—Notice of Loss or Damage—Contracts Against Negligence.*—A condition in a bill of lading that claims for loss or damage, shall be made in writing to the carrier's agent at the point of delivery promptly after the arrival of the property, and

if delayed more than thirty days after the delivery of the property, or after due time for the delivery thereof, there shall be no liability upon the carrier, is a reasonable provision and will be upheld. Such a provision contravenes no public policy and excuses no negligence, but is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged. *Liquid Carbonio Co. v. Norfolk & Western R. Co.*, 323.

2. *Railroads—Passenger's Attendant—Invitees—Care Due.*—One who accompanies his wife and small children to a railway station, where they expect to take a train and become passengers, is there by the implied invitation of the railroad company, and it is the duty of the company to exercise ordinary care for his safety and protection. *Ches. & O. R. Co. v. Fortune*, 412.
3. *Railroads—Persons Assisting Passengers—Time to Leave Train—Notice.*—A person who, in conformity with a custom acquiesced in by a carrier, goes to a railroad station to assist passengers in entering or leaving the train, is an invitee to whom the carrier owes the duty of ordinary care to see that he is not injured by reason of defective station facilities or approaches thereto. If he enters the train and his purpose is known, it is the duty of the carrier to give him a reasonable time within which to leave the train, but, if his purpose is not known, and there are no circumstances to put the carrier upon notice, then the carrier is not bound to hold the train till he has had time to alight, nor to notify him before the train starts. *Ches. & O. R. Co. v. Paris*, 408.
4. *Stepping off Moving Trains—Interference by Brakeman—Emergency.*—It is the duty of a brakeman on a passenger train to endeavor to prevent one from stepping off a moving train when it is dangerous to do so, and if, while acting in good faith to prevent an apparent danger, his efforts fail, and the person steps or falls off and is injured, there can be no recovery against the company although it is probable he might have alighted in safety but for the interference of the brakeman. *Ches. & O. R. Co. v. Paris*, 408.
5. *Railroads—Stopping at Stations—Reasonable Time.*—It is the duty of a railroad company to stop its trains a reasonable time at stations to enable passengers and baggage to be put on; and passengers and their attendants have a right to presume that the company will do so. *Ches. & O. R. Co. v. Fortune*, 412.

## CHAMPERTY.

1. *Champerty—Present Status.*—A contract by an attorney to undertake and carry on litigation at his own risk, or without costs to his client, for a share of the recovery, is contrary to public policy and void. The law of champerty as affecting civil contracts is not obsolete and inoperative in this state, nor is it affected by the re-

peal by implication of the statute, declaratory of the common law, making champerty a criminal offense. *Roller v. Murray*, 527.

2. *Parties—Privies*.—A donee of land who agrees to "take the shoes" of the donor in a champertous contract with an attorney for the recovery of the land, is not a stranger to the contract, and may set up the defense of champerty to a suit by the attorney for his share of the recovery. *Roller v. Murray*, 527.
3. *Purging Illegality*.—Where a champertous contract has been entered into between attorney and client, and, after a large portion of the property has been recovered under it, the parties reduce the contract to writing embracing the whole property originally in dispute and therein stipulate that all expenses shall be paid out of the proceeds of the land recovered, and that the attorney shall indemnify and save the client harmless against all costs, the contract is not purged of its illegality, even though the land already recovered be sufficient to pay such costs. *Roller v. Murray*, 527.
4. *Quantum Meruit—Equity*.—Whether an attorney, who fails to recover on a champertous contract can recover on a *quantum meruit*, cannot be determined in a suit in equity instituted by him which goes out of court on a demurrer for lack of equity. *Roller v. Murray*, 527.

See CONFLICT OF LAWS, 1.

## CHARITIES.

*Indefinite Charities—Devise to a Corporation for Corporate Purposes*.—

While the courts of chancery of this state will not undertake to enforce indefinite charities, a devise to a corporation for the general purposes of its incorporation cannot be said to be uncertain in any respect, and will be upheld. It is immaterial that the corporation was created by another state, and that its object is to hold property for church purposes. *Jordan v. Universalist Trustees*, 79.

CLERKS. See COURTS, 1.

## CLUBS.

1. *Social Clubs—Incorporation—Fraudulent Purpose—Violation of Sunday Laws*.—The evidence in this case shows that the object in obtaining a charter for a social club and the pretended organization thereunder was for the fraudulent purpose, on the part of the incorporators, of securing the privilege of selling tobacco, cigars, cigarettes, soda water and other soft drinks on Sunday—a privilege which they could not exercise as individuals without violating existing statutes—and the charter of said pretended social club was therefore properly vacated and annulled. *Hanger v. Com'th*, 872.

2. *Social Clubs—Incorporation—Unlawful Business.*—Social clubs authorized to be chartered under the statutes of this state are manifestly intended to be purely social. It was clearly never intended to confer upon such organizations authority to conduct a business which an individual cannot lawfully conduct. A charter of incorporation may be granted by the State Corporation Commission to an association to conduct any business that an individual may lawfully conduct, but never to conduct a business which an individual may not lawfully conduct under existing laws. *Hanger v. Com'th*, 872.

COMMISSIONERS. See EQUITY, 1.

COMMISSIONERS OF THE REVENUE. See CONSTITUTIONAL LAW, 5, 6.

CONFLICT OF LAWS.

1. *Contracts for Land—Champerty.*—Whether a contract for the recovery of land situated in Virginia is champertous or not, is to be determined by the laws of Virginia. *Roller v. Murray*, 527.

CONSTITUTIONAL LAW.

1. *Acts of Doubtful Validity.*—The federal constitution is a grant of power by the states to the federal government. The state constitution is simply a restraining instrument, and the legislature of the state has all legislative powers not forbidden by the state or federal constitution; and, while this court has power to declare an act of the legislature unconstitutional, it will never do so unless the act is plainly unconstitutional. All doubts are resolved in favor of the constitutionality of such acts. *Barbour v. Grimsley*, 814.
2. *Act of Doubtful Validity—Practical Construction.*—If a statute conferring upon courts or judges the power to appoint certain officers is of doubtful validity, it will not be declared unconstitutional where it appears that, under the same or similar constitutional provisions, like powers have been conferred by similar statutes which have never been called in question by the courts, nor by two constitutional conventions which have since assembled, but have received the sanction of the legislature, and the inferior courts of the state, and have been acquiesced in for over half a century by all the departments of the state government. The practical construction thus put upon such acts will be regarded as decisive of their validity. *Barbour v. Grimsley*, 814.
3. *Amending Acts of Assembly—Title of Acts.*—Where the title of an act declares it to be an act to amend and re-enact a prior statute, but the enacting clause makes no reference whatever to the act which is referred to in the title, and does not purport to re-enact

and publish it at length, such amendatory act is void because of its failure to comply with section 52 of the constitution, declaring that no law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title. *Beale v. Pankey*, 215.

4. *Commingleing Powers*.—The provision of the constitution dividing the powers of government into legislative, executive, and judicial, and forbidding any person to exercise the power of more than one of them at the same time, does not forbid the legislature to confer upon a court or judge the power to exercise legislative or executive duties to a limited extent. Governments could not exist if the inhibition on the intermingling of such powers in one person or body were strictly, literally, and unyieldingly applied in every situation. *Barbour v. Grimsley*, 814.
5. *Commissioners of Revenue—Appointment*.—Upon the principles stated in the foregoing paragraphs, the act of assembly conferring upon circuit courts and the judges thereof in vacation the power to appoint commissioners of the revenue for the several counties of the state is not unconstitutional. *Barbour v. Grimsley*, 814.
6. *Construction—Read as a Whole—Commissioners of Revenue—Appointment*.—The constitution of the state is to be construed as a whole, and effect given to every sentence of it, if possible. So construing the present constitution, and reading the clauses dividing the powers of the government into legislative, executive, and judicial, and forbidding any person to exercise the powers of more than one at the same time, in connection with section 110 providing that commissioners of the revenue shall be elected or appointed, as the *General Assembly may provide*, the latter provision may be regarded as an exception to the general rule, and an act of assembly authorizing circuit courts, or the judges thereof in vacation, to appoint commissioners of the revenue is not unconstitutional on the ground of being an unwarranted commingling of powers. *Barbour v. Grimsley*, 814.
7. *Due Process—Corporations*.—The constitutional provision that "no person shall be deprived of his property without due process of law," includes private corporations. *Ward L. Co. v. Henderson White Co.*, 626.
8. *Due Process—Corporations—Publication of Process—Code, Section 3225*.—The provision of section 3225 of the Code authorizing service of process on a domestic corporation by publication of the process, when there is no officer or agent of the corporation in the county on whom process may be served, affords "due process of law," and is constitutional. *Ward L. Co. v. Henderson White Co.*, 626.
9. *Test of Validity*.—The constitutional validity of a law is to be

tested, not by what has been done under it, but by what may be done. *Southern R. Co. v. Commonwealth*, 771.

See APPEAL AND ERROR, 4; COURTS, 1; CRIMINAL LAW, 7, 10, 11; EMINENT DOMAIN, 1, 4, 7; INTERSTATE COMMERCE, 1, 2, 3; MUNICIPAL CORPORATIONS, 1.

CONTEMPTS. See APPEAL AND ERROR, 6, 24; CRIMINAL LAW, 7, 8, 9, 10, 11, 12.

## CONTRACTS.

1. *Construction—Case at Bar—Railroads—Right of Way.*—A railroad company bought a right of way through a tract of land at \$28 per acre; paid the purchase price and received a deed therefor. The deed provided that the company might change the center line of its right of way to either side a distance of not more than twenty feet, upon payment of an agreed price for the additional land taken. Subsequently the owner and the company entered into a contract by which the company was permitted to change its location upon payment of \$100 per acre for each acre taken, and the company agreed to reconvey to the owner the land theretofore conveyed to it, for which it was to receive a credit of \$200. The new location contained about eighteen and three-fourths acres, of which about eight and one-half acres was a part of the original location for which the company held a deed. The owner knew that the new location occupied a large part of the old, and went over it with the agent of the company before the contract was entered into. The owner claimed that he was entitled to receive \$100 per acre for the whole of the new location, less a credit of \$200. The company claimed that it was obliged to pay the \$100 per acre for only so much of the new location as was not covered by the old, and was to reconvey to the owner so much of the old location as was not covered by the new, and was to receive a credit thereof of \$200, and the court so held. *Albert v. Tidewater R. Co.*, 256.
2. *Contracts by Correspondence—Accession to Same Terms.*—In order to establish a contract by correspondence, there must appear upon the face of the correspondence a clear accession by both parties to one and the same set of terms. A proposal to accept, or an acceptance on terms varying from the offer, is a rejection of the offer. The acceptance must be unqualified, and no point left open for future consideration or negotiation between the parties. In the case at bar, the acceptor of the offer introduced into his acceptance new terms not contained in the offer, nor implied by law, and hence no contract was concluded between the parties. *Lynchburg Hos. Co. v. Chesterfield Mfg. Co.*, 73.
3. *No Time for Performance—Reasonable Time—How Determined.*—If a written contract for the sale and delivery of railroad ties does not specify the time of performance, it is to be performed in a

reasonable time, and what is a reasonable time is to be determined by placing the court and jury in the shoes of the contracting parties at the time the contract was entered into. In the case at bar, the uncertain condition of the labor market was the subject of comment at the time the contract was entered into, and hence it was not error to permit plaintiff to show the difficulty he had in securing labor, and the efforts he made to employ hands for the fulfillment of the contract. *Norfolk & W. R. Co. v. Duke*, 764.

4. *Right Reserved to Terminate—Failure to Exercise—False Representations—Burden of Proof—Case at Bar.*—Plaintiff contracted to bore a well for the defendant at a stated price per foot, the defendant reserving to himself the absolute right to stop the work at any time he saw fit, upon payment of the contract price for work done. After a depth of five hundred feet had been reached, for which payment was subsequently made, defendant claims that the plaintiff falsely represented to him that he had reached flat rock, and that but for such representation the defendant would have stopped the work, but the boring was allowed to proceed one hundred and thirty feet deeper, for the price of which this action was brought. The trial court instructed the jury that, if the defendant claims that he would have exercised his right and stopped the work, but for the representation made to him by the plaintiff, the burden is on the defendant to prove, by a preponderance of the evidence, to the satisfaction of the jury that such representation was, as a matter of fact, untrue, and that the defendant relied upon and was misled by such representation. There was a verdict for the plaintiff for the amount of his claim, and this verdict and the instruction of the trial court are approved by this court. *Grasty v. Lindsay*, 428.

See CHAMPERTY, 1, 2, 3, 4; PARTNERSHIP, 4; SPECIFIC PERFORMANCE, 2.

CORPORATIONS. See CONSTITUTIONAL LAW, 7, 8; STATE CORPORATION COMMISSION, 1; VENUE, 1, 2.

COSTS. See NEW TRIAL, 3.

COUNSEL FEES. See ATTORNEY AND CLIENT, 2; COVENANTS, 2.

COUNTIES.

1. *County Treasurers—Ex Parte Settlements—Prima Facie Evidence Against Sureties.*—The settlements made by a county treasurer with the board of supervisors of a county are, as against his sureties who have only bound themselves for the faithful discharge by him of the duties of his office, not conclusive, but only *prima facie* evidence of the balance in his hands at the dates of such settlements respectively. The sureties are not regarded as in privity

with their principal so as to be conclusively bound by his acts. *Baker v. Preston*, Gilmer 228, overruled. *U. S. Fidelity Co. v. Jordan*, 347.

## COURTS.

1. *Constitutional Law—Jurisdiction of Courts—Powers Conferred on Clerks of Circuit Court—City Clerks.*—The whole judicial power of the state is vested by Art. IV of the constitution in certain enumerated courts, and such other courts as are thereafter authorized. The General Assembly is authorized by Sec. 101 of the constitution to confer upon the clerks of the several *circuit* courts jurisdiction to admit wills to probate, appoint guardians, etc., but no mention is made of the clerks of other courts.

*Held:* Section 2639a, Code 1904, conferring such jurisdiction on the clerks of city courts is unconstitutional. Such clerks are not within the terms or intendment of Sec. 101 of the constitution; nor is such jurisdiction conferred by Sec. 98 of the constitution authorizing the legislature to provide "additional courts" for certain cities. The "additional courts" authorized must be courts of similar grade, dignity and jurisdiction to existing city courts. *McCurdy v. Smith*, 757.

See CONSTITUTIONAL LAW, 5.

## COVENANTS.

1. *Breach of Warranty—Eviction—Actual or Constructive.*—In order to maintain an action for the breach of a covenant of warranty, there must have been an eviction. Generally, the eviction must have been actual, but sometimes a constructive eviction is sufficient. Constructive eviction is sufficient where the premises are in the actual possession of a third person under a paramount title at the date of the conveyance. It is also sufficient where the covenantee is compelled to purchase the paramount title, the validity of which has been established by the judgment or decree of a court of competent jurisdiction and ordered to be sold at public auction. *Morgan v. Haley*, 331.
2. *Breach—Measure of Damages—Counsel Fees.*—In an action by a covenantee to recover damages for a breach of a covenant of warranty of land, which he has lost by title paramount, the measure of the plaintiff's damages is the price paid for the land, with the interest from the date of eviction, and the legal and taxable costs expended by him in the action in which he was evicted. Fees paid to counsel for defending the title are not recoverable. *Morgan v. Haley*, 331.
3. *Breach—Notice of Suit—Request to Defend.*—In order that the proceedings in a suit against a covenantee to recover the land by



paramount title may be conclusive on the covenantor, when sued upon his covenant of warranty, it is necessary not only that distinct and unequivocal notice be given to the covenantor of the pendency of the suit to recover the land, but he must also be requested to appear and defend it. *Morgan v. Haley*, 331.

## CRIMINAL LAW.

1. *Arrest Without Warrant—Subsequent Procedure—"Suspicious Character"—Habeas Corpus.*—An officer may, without a warrant, arrest one whom he has reasonable ground to suspect of having committed a felony. He should then take the prisoner before the proper officer, who should, without unnecessary delay, formulate a specific complaint in writing against the prisoner, informing him of the offense of which he stands accused; and upon this complaint, he may be lawfully held until the case is disposed of according to law, and, if cause be shown by the commonwealth, the hearing may be postponed a reasonable time, not exceeding ten days at one time, without his consent. But a person charged with no offense cannot be held in custody merely as a "suspicious character," and if so held, he may obtain his discharge on *habeas corpus*. *Hill v. Smith*, 848.
2. *Attempt to Rape—What Constitutes—Force.*—To constitute the offense of an attempt to commit rape there must be force, or an intention to use force, on the part of the offender, in the perpetration of the offence, if necessary to overcome the will of the victim. The evidence must establish force or attempted force, coupled with an attempt to gratify the lustful desire, against the consent of the female, and notwithstanding resistance on her part. *Woodson v. Com'th*, 895.
3. *Attempt to Rape—Force—Case at Bar.*—The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence. In the case at bar, the evidence shows an assault by a negro man upon a white woman, accompanied by grossly insulting and indecent language, but fails to show any force or attempt at force on the part of the man to accomplish his purpose, whatever that may have been. The evidence is consistent with a desire on his part to have sexual intercourse with the woman, but does not shown an intention to use force, if necessary, to gratify his desire; but persuasion only. *Woodson v. Com'th*, 895.
4. *Bills of Exception—Presence of Prisoner.*—It is not necessary for a prisoner in a felony case to be present in person when bills of exception are presented to and signed by the judge. *Thurman v. Com'th*, 912.
5. *Change of Venue—Facts not Denied—Evidence.*—Upon an application for a change of venue in a criminal case, facts stated in the

petition for removal which the commonwealth does not ask to controvert and which the accused is not permitted to sustain by proof, must be considered as established. *Uzzle v. Com'th*, 919.

6. *Change of Venue—Local Prejudice—Jury from Another County—Case at Bar.*—Where the ground of an application for a change of venue of a criminal case is that there exists such prejudice and excitement against the accused at the proposed place of trial as to endanger the fairness and impartiality of a trial at that place, it is not necessary that the application shall be preceded by a motion for a jury from another county or corporation. The ground of the application is the inability to get a fair and *impartial trial* because of local prejudice, and not the inability to get a fair and *impartial jury*. In the case at bar, the motion for a change of venue on account of local prejudice should have been granted. *Uzzle v. Com'th*, 919.
7. *Contempts—Fine — Imprisonment — Liberty — Constitution, Section 88.*—A judgment imposing a fine upon a party for a contempt of court and giving him a reasonable time within which to pay it, but providing that if it is not paid, he shall be imprisoned, does not involve “the life or liberty of any person,” within the meaning of section 88 of the constitution. The judgment being for a fine from which the party may relieve himself, does not deprive the party of life or liberty. *Forbes v. State Council*, 853.
8. *Contempt—Punishment—Code (1904), Sec. 3771.*—The limitation of the duration of the imprisonment for contempt imposed by Section 3771 of the Code applies only to contempts mentioned in the first class of Section 3768, and not to those mentioned in the remaining four classes of that section. *Yoder v. Com'th*, 823.
9. *Contempt—Code (1904) Sec. 3768—Publication of Insulting Language Concerning Judge.*—The publication in a newspaper of insulting language concerning a judge with respect to any proceeding had in his court cannot be said to be “insulting language addressed to the judge,” and is not within the classes of contempts enumerated in section 3768 of Code 1904, for which summary punishment may be administered by a court or judge; nor is the failure to provide by that section for the summary punishment of such offenses so unreasonable, nor does it so far abridge, diminish and impair the vigor and efficiency of the courts as to render the section unconstitutional. *Yoder v. Com'th*, 823.
10. *Contempts—Regulation—Code (1904), Sec. 3768 Constitutional.*—The present statute on the subject of contempts, as contained in section 3768 of Code 1904, enlarges the classes of cases in which there may be summary punishment, and is a reasonable regulation of the exercise by the courts of the power to punish for contempt. It does not so far abridge or impair the powers of the courts established by the constitution, nor so far diminish their authority, and

is not a regulation so unreasonable, as to render them incapable of the efficient exercise of their functions, and hence is constitutional. *Yoder v. Com'th*, 823.

11. *Contempt—Regulation—Constitutional Provision*.—The constitutional provision that the General Assembly "may regulate the exercise by courts of the right to punish for contempt" was not intended to clothe the legislature with absolute power over the subject, but meant to confer upon the legislature authority to bring the subject of contempts within reasonable regulations, not inconsistent with the exercise by the courts, with vigor and efficiency, of those functions which are essential to the discharge of their duties. Courts still have the power of self preservation and self protection. *Yoder v. Com'th*, 823.
12. *Contempt—Summary Punishment—Code (1904), Sec. 3768*.—The power given to courts and judges by section 3768 of the Code (1904) to punish "summarily" for contempt is a power to punish without the intervention of a jury, and is limited to the classes of contempt set forth in that section. *Yoder v. Com'th*, 823.
13. *Evidence—Admissibility—Unrelated Facts—Res Gestae—Dying Declarations*.—On a trial of a prisoner for the murder of a man who was shot while driving along a public road in his buggy, the statements of the deceased when in a dying condition that a third person, on his invitation, got into his buggy and rode with him, but left it before and beyond where he was shot, are not admissible in evidence either as a part of the *res gestae* or as a dying declaration. They are not so connected with the fact under investigation as to constitute part of it, nor do they relate to the cause of the death of the deceased nor to the circumstances leading up to it. *Richards v. Com'th*, 881.
14. *Evidence—Cross-Examination of Witness*.—No prejudice results to a prisoner from refusing to allow him to cross-examine a witness on matters not brought out in his examination in chief, where the witness is subsequently put on the stand by the court as its witness and the defendant is allowed to cross-examine him on the matters previously excluded. *Richards v. Com'th*, 881.
15. *Evidence—Experiments*.—In order to show by experiment that a prisoner's shoe made a track shorter than his shoe, the experiment must have been made under the same or substantially similar conditions to those which existed at the time the tracks were made. *Richards v. Com'th*, 881.
16. *Evidence—Incriminating Circumstances*.—Evidence that deceased had a large sum of money just before he was killed, but that none was found on his person or among his effects after he was murdered, and that the accused had no money before the death of the deceased, but did have money after, is competent as tending to

incriminate the accused when he is otherwise connected with the crime. *Thurman v. Com'th*, 912.

17. *Indictment—Statute Containing Exception.*—If an exception to a statute is so incorporated with the enacting clause that the one cannot be read without the other, then the exception must be negatived in any indictment for a violation of the statute; but if the exception be in a substantive clause subsequent to the enacting clause, though in the same section, it is matter of defense to be shown by the defendant. *Devine v. Com'th*, 860.
18. *Insanity—Irresistible Impulse.*—Irresistible impulse, to excuse crime, must spring from a diseased mind, in other words, must be an insane impulse. It is not error to refuse to substitute "injured mind" for "diseased mind" in this connection. *Thurman v. Com'th*, 912.
19. *Intoxicating Liquors—Cider—Case at Bar—Analysis—Samples.*—The preponderance of evidence in this case shows that the cider sold by the defendant did not contain a greater percentage of alcohol than is allowed by the statute, and he should have been acquitted. The guilt or innocence of the accused depended upon the amount of alcohol the cider contained, and, while the correctness of the analyses introduced in evidence is not questioned, there were ample opportunities for tampering with the samples analyzed by the commonwealth before the analysis was made, and the analysis was, therefore, of little probative value. *Devine v. Com'th*, 860.
20. *Intoxicating Liquors—License—Exception in Statute—Cider—Burden of Proof.*—Upon a charge of selling liquor without a license in this state, it need not be denied that the liquor sold was pure apple cider, although that is an exception contained in the statute. If it is pure apple cider, that is a matter of defense and comes more properly from the defendant, who has the burden of proof on that question; the exception in the statute being in a substantive clause and not in the enacting clause. *Devine v. Com'th*, 860.
21. *Intoxicating Liquors—Sale Without License—United States License—Effect as Evidence.*—If, on an indictment for selling liquor without license, the commonwealth simply proves the possession of a United States license to sell liquor, the probative value of such evidence is to be determined in connection with all the other evidence in the case, and is primarily a question for the jury, with respect to which this court, at present, expresses no opinion. *White v. Com'th*, 901.
22. *Intoxicating Liquors—Sale Without License—United States License—Case at Bar—Instructions.*—A statute provides that the possession of a United States license to sell liquor by retail and no such license from state, shall be evidence of selling by retail without a state license to do so. An indictment under the statute, found

March 18, 1907, charged defendant with a sale without license within two years last past. The only evidence offered by the commonwealth was the possession by the defendant of a United States license to sell liquor from July 31, 1906, to June 30, 1907. The court instructed the jury that if they believed from the evidence that the accused "held a license as a retail malt liquor dealer from the United States government, within two years last past from the 18th of March, 1907, the possession of such license shall be evidence of selling malt liquor by retail."

*Held:* The instruction was erroneous, as, under it, the jury might have found the accused guilty of having committed the offence between March 18, 1905, and July 31, 1906, when there was not a shadow of evidence upon which to base such a conviction. All that is stated in the instruction may be true, and yet the accused not guilty. *White v. Com'th*, 901.

23. *Intoxicating Liquors—Sale Without License—Evidence—United States License—Proof of Certificate.*—The fact that a statute permits the existence of a United States revenue license to sell liquor to be proved by the testimony of the internal revenue collector for the district, or any of his deputies who know the fact, does not exclude the proof of the existence of such license by the duly authenticated certificate of such collector. The presumption is that the legislature meant to provide additional modes of proof, and not to exclude any existing lawful proof of the fact. The certificate is the most convenient and certain mode of proof, and its use could not have prejudiced the accused in this case. *White v. Com'th*, 901.
24. *Intoxicating Liquors—Sale Without License—Indictment—Place of Sale—Time.*—An indictment for selling liquor without a license is sufficient which follows the language of the statute in charging that the defendant "in said county within the two years last past, did, unlawfully and without a state license so to do, sell spirituous or malt liquors, whiskey, brandy or some mixture thereof, alcoholic bitters, bitters containing alcohol or some mixtures, preparations or liquors which will produce intoxication." Place is not of the essence of the offence under such a statute, and need not be more specifically stated than "in said county"; nor is the exact time, and the charge of within "two years last past" is sufficient. *White v. Com'th*, 901.
25. *Intoxicating Liquors—Sales to Several Persons—Election to Prosecute as to one—Evidence of effect on Others—Case at Bar.*—If, upon the trial of a warrant for selling liquor without a license to several persons, the commonwealth elects to prosecute for a sale to one only, it cannot upon that warrant prosecute the accused for selling to any other person, nor prove sales to others in aid of its proof that he was guilty of the offense for which he was being prosecuted; though it may show by others the effect produced upon them by drinking a beverage purchased by them of the accused and

bearing the same brand as that for which he is being prosecuted. In the case at bar, the witnesses for the commonwealth were questioned as to sales made to them by the accused, but it is clear, under the facts and circumstances of the case, that the accused was not prejudiced thereby. *Devine v. Com'th*, 860.

26. *Jurors from Another County—Case at Bar.*—While the action of the trial court in directing a jury to be summoned from another county in a criminal case will not be reversed unless it is plain that it has improperly exercised the discretion vested in it, still one accused of crime is guaranteed by the constitution and laws of the state a trial by a jury of his vicinage, and it must be made to appear in some manner that it is reasonably necessary to send to another county for a jury in order to obtain qualified jurors. The evidence in this case does not show that it would have been inconvenient, within any reasonable meaning of that word, to have obtained a jury in the county in which the alleged offence was committed. *Richards v. Com'th*, 881.
27. *Misdemeanors—Sunday Laws.*—The violation of the Sabbath law as contained in section 3799 of the Code is not a misdemeanor, and the forfeiture imposed therefor is recoverable only by a civil warrant, and not by a criminal warrant against the offender. The fact that this section is contained in a chapter of the Code which treats of "offenses against morality and decency" does not indicate that its breach is a misdemeanor. The mere collocation of a statute is not a conclusive test of its character. *Wells v. Com'th*, 834.
28. *Murder—Indictment—Harmless Error.*—One who has been convicted of murder of the first degree upon sufficient evidence cannot raise the objection that the indictment charged him with murder of the first degree, instead of murder generally. It is a matter of no concern to him. *Thurman v. Com'th*, 912.
29. *Murder—Indictment—Record.*—Whether an indictment for murder be of one degree or another is to be determined from an inspection of the indictment itself, and not from the memorandum which the clerk makes on the record of the finding of the indictment. The memorandum is no part of the indictment. *Thurman v. Com'th*, 912.
30. *New Trial—Insufficient Evidence—Conduct of Detective.*—The evidence in this case is palpably insufficient to support the verdict of conviction which was found. It consists solely of the testimony of one witness, who admitted his perjury in the case, and of an amateur detective, whose story furnishes internal evidence of the fact that it was a sheer fabrication, and who resorted to methods so flagrantly reprehensible as to bring reproach upon the administration of justice if they were sanctioned. *Fields v. Com'th*, 868.
31. *Sunday Law—Forfeiture—How Recovered.*—The forfeiture prescribed by section 3799 of the Code for a violation of the Sunday

law can be recovered by civil warrant only, and the objection that the procedure was by a criminal warrant instead of a civil warrant, may be raised in this court for the first time. The question of jurisdiction of the subject matter of litigation is an open one in every case until the case is finally disposed of. *Hanger v. Com'th*, 872.

32. *Sunday Laws—Violation by Employer and Employee.*—Any person, whether employer or employee, who violates the provisions of the Sabbath laws as contained in section 3799 of the Code is amenable to the forfeiture thereby imposed. In other respects, this case is controlled by *Wells v. Commonwealth*, ante p. 834. *Puckett v. Com'th*, 844.
33. *Suspension of Sentence—Parole—Violation—Computation of Time—Increased Punishment.*—A prisoner serving a jail sentence cannot be paroled by the judge of the court during good behavior, and upon default remanded to jail to serve out the original term of his confinement, without counting the period during which he was out on parole. There is no law in this state authorizing such a practice. During the period of his parole he is morally and actually under the restraint of his parole, and under the orders of the jailor. To exclude the time without a parole, would be, for the same offence, to impose upon the prisoner another and additional punishment to that originally pronounced. *Scott v. Chichester*, 933.
34. *Venire Facias—List—"Of His County or Corporation."*—A writ of *venire facias* which directs a sergeant to summon "sixteen persons from the list attached," which is the list required to be drawn from the box provided by sections 3142 and 3144 of the Code, necessarily requires that such persons be "of his corporation," as only residents of his corporation are included in the list from which he is directed to summon sixteen. The writ and the list attached constitute the writ of *venire*, and are to be read together. *Thurman v. Com'th*, 912.
35. *Venire Facias—When to be Returnable.*—A writ of *venire facias*, returnable to the second day of the term of a trial court is not for that reason invalid on its face as the court or the judge in vacation had the right to direct it to be so returnable, and, if no ground is assigned in the trial court for quashing the writ, it will be presumed in this court that the judge in vacation directed the writ to be returnable to the second day of the term. *Thurman v. Com'th*, 912.
36. *Verdict—Open Court—Presence of Prisoner.*—It sufficiently appears from the record in this case that the verdict of the jury was rendered in open court and in the presence of the accused. The record states that the jury "retired to their room to consider of their verdict, and after some time they returned into court, having found a verdict in the following words: 'We the jury find the prisoner guilty of murder in the first degree, as charged in the

within indictment.' And, thereupon, the prisoner moved the court for a *venire facias de novo*, and that a new trial be granted him, the further hearing of which is adjourned. And the said Leo C. Thurman *alias* F. C. Gould, is remanded to jail." *Thurman v. Com'th*, 912.

See APPEAL AND ERROR, 6, 24; BILLS OF EXCEPTION, 3; EVIDENCE, 19; INSTRUCTIONS, 7; JURY, 1; WHARVES, 1; WITNESSES, 3.

CROSSINGS. See RAILROADS, 2, 3, 4, 5, 6, 9, 10, 11.

CURATORS. See WILLS, 1.

CURTESY. See HUSBAND AND WIFE, 1, 2.

CUSTOM. See EVIDENCE, 19.

#### DAMAGES.

1. *Excessive Damages*.—The verdict of a jury will not be set aside as excessive unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. *Southern R. Co. v. Smith*, 553.
2. *Verdicts—Excessive Damages*.—The verdict of a jury in an action to recover damages for a personal injury will not be set aside as excessive unless the damages allowed are so excessive as to indicate that the jury were influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Ches. & O. R. Co. v. Fortune*, 412.

See COVENANTS, 2; EMINENT DOMAIN, 1, 2, 3, 4, 8.

#### DEATH BY WRONGFUL ACT.

1. *Action by Injured Party—Revival after Death—Final Judgment—Res Judicata*.—Under the Virginia statute giving a right of action for death occasioned by the wrongful act, neglect or default of another, but one action can be maintained to recover damages for an injury resulting in such death, as there is but one cause of action in such a case; and whether that action be brought by the injured party in his lifetime and revived after his death, or a new action be brought by the personal representative within the statutory period, as provided in the statute, only one recovery can be had, and that for the benefit of the next of kin named in the statute, where any such exist. If an action brought by the injured party in his lifetime be revived in the name of his personal representative after his death, and proceed to final judgment, it is a bar to any other action to recover damages for the same injury. The object of the



statute was to give a right of action where none existed at common law, and to prevent an action from abating which would otherwise have abated, but not to allow two actions against the same defendant for the same injury. *Brammer v. Norfolk & W. R. Co.*, 206.

#### DEDICATION.

1. *Acceptance—City Streets—Roads.*—The intention to dedicate a street in a city, or a road in the country, may be shown in any way by which intention may be manifested. The acceptance of the dedication may, in the case of streets, be shown by the acts of corporation officers, but the acceptance of a road, in order to impose upon the public the duty of keeping it in order, must appear as a matter of record, though a formal acceptance is not necessary. It is sufficient if the record of the proper tribunal shows other acts whereby the road is claimed as a public one. *Lynchburg Traction Co. v. Guill*, 80.

#### DEEDS.

1. *Absence of Seal—Conveyance of Land.*—A paper concluding "Witness my hand and seal," but to which no seal or scroll by way of seal, is annexed, is not a sealed instrument, and is ineffectual to convey land in this state. *Burnette v. Young*, 184.
2. *Description of Land—Case at Bar—Vendor and Purchaser.*—A deed conveying land, in order to be valid against a subsequent purchaser, must so describe and identify the property conveyed as to afford the means, with the aid of extrinsic evidence, of ascertaining with accuracy what is conveyed and where it is. In the case at bar, the land conveyed was described as situated on Chincoteague Island and embraced within certain courses and distances, but no starting point or ending point is given, and hence the location of the land could not have been ascertained, and the deed is inoperative as against a subsequent purchaser for value even if he had notice of its existence. *Merritt v. Bunting*, 174.
3. *What Passes—Appurtenances—Water Rights.*—A grant of all the grantor's "right, title and claim of whatever kind, in and to" certain property carries with it, as an appurtenance, the easement of a waterway over the lands of the grantor to and for the use of the premises granted, although such easement be not expressly mentioned. Code, Sec. 2443. *Norfolk & W. R. Co. v. Obenchain*, 596.

See BOUNDARIES, 3; FRAUD AND FRAUDULENT CONVEYANCES, 1. 2.

#### DEMURRER.

1. *Voluntary Statement of Grounds—Other Grounds—Code, 1904, Section 3271.*—Under the provisions of section 3271 of the Code

(1904), where a plaintiff voluntarily states in writing the grounds of his demurrer to a plea in abatement, no other grounds can be considered than those so stated. The fact that the grounds were stated voluntarily, and were not required by the court, is immaterial. The statute applies as well in one case as the other. *Va. & Southwestern R. Co. v. Hollingsworth*, 359.

See EQUITY, 6.

#### DEMURRER TO EVIDENCE.

1. *Demurrer Overruled—Verdict Set Aside—New Trial.*—When a demurrer to evidence is overruled, but the conditional verdict of the jury is set aside for lack of evidence to support it, the trial court should, upon request of the demurrant, permit him to withdraw his demurrer to the evidence, and direct a new trial of the whole case, and not simply award an inquiry of the damages sustained. *Merchants Trans. Co. v. Masury*, 40.
2. *Doubtful Conclusion.*—On a demurrer to evidence, if there is room for difference of opinion among reasonable men as to the conclusion to be reached, the demurrer should be overruled. *Norfolk & W. R. Co. v. Dean*, 505.
3. *Necessary Inferences.*—Where the only evidence that the insured was not, at the date of the policy, the unconditional and sole owner of the property insured consists of parol evidence offered by the insurer as to a written agreement, neither the date nor terms of which are shown, and the insurer demurs to the evidence, it is not a necessary inference that the agreement was in existence when the policy was issued and that the insured could specifically enforce it, and hence these facts will not be inferred. *Rochester Ins. Co. v. Monumental Ass'n*, 571.

#### DISCLAIMER.

1. *Parol Disclaimer of Title.*—The acquiescence of the agent of one party in the directions given to a surveyor by counsel of the other party as to the running of a disputed line, is not a parol disclaimer of title of his principal, and the fact of such acquiescence may be shown in evidence. *Douglas L. Co. v. Thayer Co.*, 292.

DOWER. See WILLS, 5, 6.

#### EASEMENTS.

1. *Abandonment.*—The mere nonuser of an easement which has been created by grant does not extinguish it, or show that it has been abandoned. To show this, there must be acts by the owner showing an intention to abandon, or an adverse user by the owner of the servient tenement, acquiesced in by the owner of the dominant

estate. Nothing short of a user by the owner of the servient estate, which is adverse to the enjoyment of the easement by the owner thereof, for a period sufficient to create a prescriptive right, will destroy the right granted. *Norfolk & W. R. Co. v. Obenchain*, 596.

## EJECTMENT.

1. *Burden of Proof—Title at Commencement of Action.*—A plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness of that of his adversary, and this title must exist in the plaintiff at the time of the commencement of his action. It cannot be acquired afterwards. *Merryman v. Hoover*, 485.
2. *Outstanding Legal Title—Subsequent Purchase.*—An outstanding legal title in another than the plaintiff, at the time of the institution of an action of ejectment, breaks in upon and disrupts the plaintiff's paper title and bars his recovery. Nor can the plaintiff make good the defect by the subsequent purchase of such outstanding title. *Merryman v. Hoover*, 485.
3. *Outstanding Legal Title in State.*—A defendant in ejectment may rely upon an outstanding legal title in the commonwealth at the time of the institution of the action, and thereby defeat the plaintiff. *Merryman v. Hoover*, 485.
4. *Plaintiff's Title.*—It is incumbent on the plaintiff in ejectment to trace his title to the commonwealth, or in some other manner show that he is entitled to the possession of the land sought to be recovered as against the defendant. *Bugg v. Seay*, 648.
5. *Prior Purchaser—Unrecorded Deed—Proof of Payment of Consideration by Subsequent Purchaser.*—If a party claiming to be the purchaser of a tract of land for a valuable consideration and without notice of a prior unrecorded deed, can maintain ejectment against the grantee therein, he must show that he received his conveyance and actually paid the purchase money before he had notice of the prior unrecorded deed. The recital in his deed of the payment of the purchase money is evidence against his grantor, but as against the grantee in the prior deed is mere hearsay. *Bugg v. Seay*, 648.

See LIMITATION OF ACTIONS, 2.

ELECTION BETWEEN DOWER AND DEVISE. See WILLS, 5. 6.

## ELECTIONS.

1. *Illegal Registrations—Purging List—Mandamus.*—Whether a person offering to register is a qualified voter or not is to be determined in the first instance by the registrar, from whose decision an appeal is given to any person denied registration (Code, Sec.

83a) and whose list may be purged of those improperly allowed to register upon the application of five qualified voters proceeding in the manner pointed out by Sec. 86 of the Code. In view of the nature of the duties devolved upon the registrar and of the remedies afforded by sections 86 and 83a of the Code, *mandamus* will not lie against a registrar to compel him to purge his list of names alleged to have been improperly registered by him. *Spiliter v. Guy*, 811.

#### EMINENT DOMAIN.

1. *What Constitutes "Damage."*—The constitutional inhibition against taking or damaging private property for a public use without making just compensation therefor, and the statute passed in pursuance thereof, embrace and give a remedy for every physical injury to property, whether by noise, smoke, gases, vibration or otherwise, and every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, causing special pecuniary damage to the owner, for which an action would lie at common law. There need be no physical invasion of the owner's real property, but the owner may recover if the construction and operation of the improvement would amount to a private nuisance at common law, or is the cause of substantial damage, though consequential. *Tidewater R. Co. v. Shartzer*, 562.
2. *"Damage" by Smoke, Noise, etc., of Railroads.*—Where the use and operation of a railroad will depreciate the market value of property by reason of the smoke, noise, dust and cinders arising from the ordinary and lawful operation of the road, the property is "damaged" within the meaning of the constitution and the statute passed in pursuance thereof, and the owner of such property is entitled to compensation. *Tidewater R. Co. v. Shartzer*, 562.
3. *"Damage" to Property—Multiplicity of Claims.*—The fact that the constitutional guaranty of compensation for property "damaged" will give rise to an infinite number of claims, is no valid objection to its enforcement. The right to compensation is co-extensive with the damage or injury, both in space and in amount. No arbitrary rule on the subject can be laid down, but it will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case, whether or not there has been such damage to property as should be compensated. *Tidewater R. Co. v. Shartzer*, 562.
4. *Property "Damaged"—Constitutional Provision—Legislative Power.*—Under a constitutional provision forbidding the legislature to pass any law whereby private property may be taken "or damaged," without just compensation, the legislature has full power to require any company exercising the power of eminent domain

to make compensation to any person whose property is damaged by the proposed improvement, whether any portion of the property is actually taken or not. The legislature has full legislative power, except so far as restrained by the constitution expressly, or by necessary implication. *Tidewater R. Co. v. Shartzer*, 562.

5. *Finding of Commissioners—Weight—Testimony of Commissioners.*—

The finding of the commissioners in condemnation proceedings is entitled to great weight, and is not to be disturbed unless shown to be erroneous by clear proof. Great weight is attached to the view. The commissioners see the land and can judge of its value themselves, and are also thereby better enabled to apply the evidence produced before them to the subject of controversy, and to determine the weight to be given to its several parts. This rule is not to be disregarded or affected by the mere fact the evidence relied on to overthrow the finding consists in part of the testimony of the commissioners themselves, given five years after making their report, which they say was made in strict conformity to the instructions of the court. After a long lapse of time, the removal of buildings and a complete change in the condition of the property, and when recollection of the matter has become vague and uncertain, the findings of commissioners, made in pursuance of proper instructions from the court, as to the elements of damages to be considered, and supported by the evidence of a number of witnesses of intelligence and experience, will not be set aside as excessive, although the commissioners, aided by memoranda, furnished by one of them, state that \$5,000 of the \$22,900 allowed by them was "for taking a man's business away from him." *Hunter v. Ches. & O. R. Co.*, 158.

6. *Just Compensation—Market Value—Loss of Profit.*—Where the

whole property is taken in condemnation proceedings under constitutional and statutory provisions declaring that private property shall not be taken for a public use without just compensation, the "just compensation" contemplated is the market value of the property in view of any purpose to which it is adapted. The full and perfect equivalent for the property taken is what the law contemplates as the market value thereof. Loss of profits in a business destroyed or damaged is not an element for consideration in determining the market value of the property taken, though the profits earned in a business conducted on said property are proper to be considered in determining the market value of the property taken. *Hunter v. Ches. & O. R. Co.*, 158.

7. *Public Use.*—Private property cannot be condemned "for the purpose of securing the necessary power to operate a public cider mill and the machinery of a certain public telephone exchange now on the land" of the petitioner, in the absence of any averment or proof of the public benefit to be derived therefrom. The private benefit of the petitioner too clearly predominates the public inter-

est to justify the condemnation. The test of a public use is whether a public trust is imposed upon the property taken—whether the public has a legal right to the use which cannot be gainsaid, denied or withdrawn by the owner after the condemnation and appropriation. *Dice v. Sherman*, 424.

8. *Report of Commissioners—Weight—Amount of Damages.*—Where commissioners in condemnation proceedings have heard the evidence of the witnesses offered, and have also viewed the premises, their findings as to amount of the damages which land owners will sustain, are entitled to great weight, and will not be disturbed by the courts except upon clear evidence that their estimates were excessive or inadequate. For error of judgment in arriving at the amount of damages, if any, there can be no correction, especially where the evidence is conflicting, unless the damages allowed are so excessive or inadequate as to show prejudice or corruption. The commissioners are not bound by the opinions of experts or the apparent weight of the evidence, but may form their own conclusions. *Barnes v. Tidewater R. Co.*, 263.
9. *Water Apart from Land—Compensation.*—Interests in water, as well as in land, are subject to the law of eminent domain. Such interests are indispensable to water companies, and, when the waters of a stream are diverted, the inferior riparian proprietor is entitled to compensation for the use of the water of which he is deprived. *Clear Creek Co. v. Gladeville I. Co.*, 278.
10. *Water Apart from Land—Virginia Statutes—Interest and Estate in Land.*—Under the present statute law of this state (Code, 1904, Ch. 46 B), a public service corporation having authority to condemn "lands, water, water rights, or any other property, and any estate or interest therein for its uses and purposes," may, as against a lower riparian owner, condemn the entire estate of such owner in the water of a stream without condemning the bed of the stream over which the water flows. If such owner owns the fee-simple estate in the land, his riparian rights in the water flowing through it are appurtenant and co-extensive with that estate, and no less estate in the water can be condemned. The water flowing through the land is an *interest* in the land, and nothing less than the owner's whole *estate* in this interest can be condemned, but it is not necessary to condemn his whole interest in the land in order to acquire the water. *Clear Creek Co. v. Gladeville I. Co.*, 278.

## EQUITY.

1. *Court Commissioner Disbursing Funds—Taking Sides in Controversy.*—A commissioner appointed to disburse funds under the control of the court is the mere agent of the court. If doubts arise as to which creditor is entitled to payment, he may ask the advice and direction of the court, but he has no right to take sides in controversies over funds in his hands, or to aid any claimant in assert-

ing his right thereto, and documentary evidence furnished by him to show that a particular creditor is not entitled to a fund, is no part of the record, and cannot be considered by the court in the determination of that question. *Watts v. Newberry*, 233.

2. *Equity Jurisdiction—Land in Another State.*—A court of equity in this state cannot decree the sale of land lying in another state. *Roller v. Murray*, 527.
3. *Equity Jurisdiction—Mere Construction of Wills and Deeds.*—In order to give a court of equity jurisdiction to take cognizance of and construe a will, there must be an actual litigation in respect to a matter which is a proper subject of jurisdiction of a court of equity as distinguished from a court of law. The mere construction or interpretation of wills and deeds which devise or convey purely legal estates or interests, is not of itself a ground of equity jurisdiction. The power to construe such writings is simply an incident to the court's jurisdiction over a case on some one of the recognized grounds of equity jurisdiction. *Hart v. Darter*, 310.
4. *Equity Pleading—Amendments.*—Where a bill has been twice amended, the evidence taken, and the case fully heard and decided on its merits, further amendments, offered without explanation or excuse, are properly rejected. *Roller v. Murray*, 527.
5. *Equity Pleading—Amendments.*—If a plaintiff misdescribes his contract in his original bill, or omits to mention a subsequent modification, or a re-execution of the contract sued on, the error or omission may be corrected by amendment before an answer is filed or evidence taken; and even where the evidence disclosed a misdescription of the contract sued on, the complainant may be permitted to amend his bill to conform to the proof. *Roller v. Murray*, 527.
6. *Equity Pleading—Demurrer—Consideration of all Pleadings and Exhibits.*—Though a supplemental bill should intend to deny a material fact set forth in the original bill, and supported by exhibits filed therewith, the court is not bound on demurrer to give effect to such intendment, if the contrary appears from the complainant's exhibits or from his case as a whole, but will interpret for itself the documents and contracts exhibited, in the light furnished by their own provisions and surrounding circumstances, and in the light of the other exhibits and the other allegations of the pleadings. *Roller v. Murray*, 527.
7. *Equity Pleading—Parties Defendant—Lack of Interest or Liability.*—A demurrer to a bill to restore a water-right is properly sustained as to a defendant who is not charged to have obstructed the right, whose rights are not involved in the suit, and against whom no relief is prayed either by the complainant or his co-defendant. *Norfolk & W. R. Co. v. Obenchain*, 596.
8. *Equity Practice—Suppression of Depositions taken after Case Submitted.*—The suppression of the depositions of the complainants in this cause, taken after the case had been argued and submitted,

was not error under the circumstances of this case. The cause had been pending for some time, and they had already testified more than once. *Showalter v. Showalter*, 713.

9. *Issue out of Chancery—Affidavits Allowed by Statute—Contents.*—Under section 3381, Code 1904, the mere affidavits of parties and counsel that the case will be rendered doubtful by conflicting evidence, is not sufficient to warrant a chancellor in ordering an issue. The court is still to exercise its discretion, on sound principles of reason and justice, as to the necessity for the issue, and this it cannot do unless the affidavits contain sufficient facts to furnish a proper basis for its judgment. The affidavits simply take the place of the testimony required prior to the enactment of the statute. *Stevens v. Duckett*, 17.
10. *Issue out of Chancery—Effect of Improperly Ordering—Reversal—How Record Viewed on Appeal.*—In determining whether a trial court erred in awarding an issue out of chancery, this court will not be influenced by any matters connected with the testimony taken on the trial of the issue, but will look simply at the state of the proof existing at the time when the issue was ordered. If it appears that the issue was improperly awarded because of the insufficiency of the affidavits upon which the application was based, this court will reverse the order awarding the issue, although a verdict has been found in favor of the plaintiff, and will remand the cause for further proceedings. *Stevens v. Duckett*, 17.
11. *Issue out of Chancery—Object—When to be Ordered.*—The object of an issue out of chancery is to satisfy the conscience of the chancellor in a doubtful case. It is not sufficient that the evidence is simply conflicting, but the case must be doubtful, and there must be proper evidence that it is doubtful. The propriety of ordering an issue depends upon sound discretion, which is to be cautiously and diligently exercised according to the circumstances of the particular case. A party cannot be deprived, by an order for an issue, of his right to a decision by the court on a case as made by the pleadings and proof, unless the conflict of the evidence is so great, and its weight so nearly evenly balanced, that the court is unable to determine on which side the preponderance is. *Stevens v. Duckett*, 17.
12. *Laches—Reasonable Time—Demurrer.*—In a suit to rescind a contract for fraud, no precise time can be stated within which suit must be brought. What is a reasonable time must, in large measure, depend upon the exercise of a sound discretion by the court under all the circumstances of the particular case. In the case in judgment, in view of the allegations of the bill, the question of laches cannot be determined on demurrer, but must await the coming in of the evidence adduced upon the hearing. *Garrett v. Finch*, 25.



13. *Multifariousness—Fraud.*—In cases involving questions of fraud, great latitude is allowed in pleading, both as to the circumstances charged and the parties impleaded, provided one connected scheme of fraud is averred. If justice can be conveniently administered in the mode adopted, the objection of multifariousness will not lie, unless it is so injurious to one party as to render it inequitable to accomplish the general good at his expense. *Garrett v. Finch*, 25.
14. *Quieting Title—Enforcement of Lien on Part of Tract—Irreparable Injury.*—If the purchaser of a part of a tract of land, who, knowingly, purchased subject to a vendor's lien on the whole tract, can maintain a bill in equity against his vendor and the holder of the lien to compel the enforcement of the lien against the residue of the tract, the bill must make such definite averments of fact as will show imminent danger of irreparable injury if equitable relief is not afforded. *Lennig v. Harrisonburg Imp. Co.*, 458.
15. *Rescission—Equity Jurisdiction—Remedy at Law.*—Where a contract of lease has been procured by fraud, the party defrauded has the right, upon discovery of the fraud, to elect to rescind, and to invoke the aid of a court of equity for that purpose. *Garrett v. Finch*, 25.

See CHAMPERTY, 4; FRAUD AND FRAUDULENT CONVEYANCES, 3; INJUNCTIONS, 1; JUDICIAL SALES, 1; PARTITION, 1, 2; QUIETING TITLE, 1, 3, 4.

#### ESTOPPEL.

1. *Assignment Induced by Debtor—Promise to Pay Assignee—Fraud.*—If a debtor induces a third person to take an assignment of his notes by his assurance made beforehand that "the notes are all right," or if, after assignment and notice thereof, the debtor expressly or impliedly promises the assignee to pay the notes, and the retraction of such promise would operate as a fraud upon the assignee, in either event the debtor is estopped from setting up any equity or defense he may have against the assignor, however well founded it may originally have been. After the notice of the assignment and the promise to pay to the assignee, no subsequent transactions between the assignor and the debtor can invalidate the notes in the hands of the assignee. *Isaac Eberly Co. v. Gibson*, 315.
2. *Ignorance of Facts—Possession Taken by Mistake.*—The owner of land encroached on by a church building and cemetery, upon ascertaining, for the first time, that there has been such encroachment, is not estopped from asserting his title thereto, when, at the time of the encroachment, both he and the parties encroaching thought that the building and cemetery were on the land of an adjacent owner who had consented thereto. *Davis v. Oren*, 283.

## EVIDENCE.

1. *Abandoned Pleadings—Impeachment.*—Where an amended declaration has been substituted for the original, the averments of the original, in the absence of any evidence that they were unauthorized, may be introduced on the cross-examination of the plaintiff for the purpose of impeaching him. *Browder v. Southern R. Co.*, 10.
2. *Admissibility—Objection by Party who has Proved Same Facts.*—An objection to the admissibility of evidence is unavailable to one who has himself elicited the same facts in the cause. *Douglas L. Co. v. Thayer Co.*, 292.
3. *Admissibility—Waiver of Objection.*—An objection to evidence which has been improperly admitted will be deemed to have been waived if the objector subsequently introduces the same evidence himself. *Southern R. Co. v. Hansbrough*, 733.
4. *Objection to Admissibility—When Too Late.*—An objection to reputation evidence of the location of a corner will not be sustained where similar evidence has already been introduced without objection. *Douglas L. Co. v. Thayer Co.*, 292.
5. *Appeal and Error—Objections for the First Time—Disqualification of Judge—Evidence—Clerk's Certificate.*—The objection that a judge of a circuit court of a circuit adjoining that in which the suit was brought, or that a city judge presided at the hearing of a cause without designation by the governor, as required by statute, cannot be made for the first time in this court; nor can the fact that the resident judge failed to enter of record his disqualification to sit be made to appear by the certificate of the clerk of the non-existence of such an entry. Such certificate is no part of the record. The custodian of documents and records cannot establish their non-existence in his office by his certificate to that effect, but must be sworn and examined as any other witness. *Smith v. White*, 616.
6. *Construction of Writings—Extrinsic Evidence.*—Written instruments are to be construed by the terms used therein, if plain and intelligible. Extrinsic evidence is not admissible for the purpose of adding to, detracting from or in any way varying the plain meaning of the instrument itself. In construing a writing, extrinsic evidence may, as a rule, be admitted only for the purpose of explaining a latent ambiguity, or of applying ambiguous words to their proper subject matter. Words of a definite legal significance, or which have a well defined primary meaning, are to be understood as used in such sense, unless there appear in the writing a manifest intention of using them in a different sense. *Roanoke v. Blair*, 639.
7. *Custom—Burden of Proof—Knowledge of Custom.*—The burden is upon the party alleging a custom to prove it by satisfactory evi-

dence. Furthermore, knowledge of the existence of the custom must be brought home to the party to be affected thereby, unless the evidence shows that it is so uniform and notorious at the place where he resides as to raise a *prima facie* presumption that he knew of it. *Bowles v. Rice*, 51.

8. *Dangerous Character of Animal—Opinion—Facts—Case at Bar.*—It being important to show the dangerous character of a mule, a witness who was asked to state the general character and condition of the mule, with reference to being wild, safe or dangerous, replied "she was a high strung mule, and a little fiery and headstrong, and she would not mind very well when you spoke to her."

*Held:* The question is admissible. It does not call for an opinion, and the answer does no more than give to the jury such knowledge of the subject as the witness had, from which the jury could determine whether or not the animal was wild and dangerous, or safe. *Blackwood Coal Co. v. James*, 656.

9. *Effect of Acceptance of a Check "In Full of all Demands."*—The acceptance of a check containing the words "in full of all demands," raises a *prima facie* presumption that it is in full payment and discharge of all previously existing liabilities, and the burden of overcoming this presumption by direct or circumstantial evidence rests upon the payee. *Lurty v. Lurty*, 466.

10. *Excluding Answer of Witness—Anticipated Answer.*—An exception to the action of a trial court in refusing to permit a witness to answer a question will not be considered by this court, if the bill of exception is silent as to what answer was expected to be elicited. *Douglas L. Co. v. Thayer Co.*, 292.

11. *Experts—Opinions Rejected in this Case.*—Questions propounded to a surveyor on the witness stand for the purpose of eliciting his opinion as to whether the matter in controversy might not be settled by the location of a designated line, or whether a given marked line is a true line, do not come within the scope of expert testimony, and cannot be asked. *Douglas L. Co. v. Thayer Co.*, 292.

12. *Fraud—Undue Influence—Burden of Proof—Shifting of Burden.*—Fraud is never presumed, but must always be proved by the party alleging it. This burden never shifts; and while it is necessary for the propounder of a will, the probate of which is resisted on the ground of undue influence, to bring forward evidence to repel evidence of undue influence which has been offered by the other side, the real burden of proof upon the issue of undue influence has not changed, and it is misleading and erroneous, after having instructed the jury correctly on the subject, to further instruct them that "the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will and testament of a free and capable testator." *Wallen v. Wallen*, 131.

13. *Impeaching Witness—Rehabilitation.*—Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth. *Ches. & O. R. Co. v. Fortune*, 412.
14. *Improper Admission—When Harmless.*—A judgment will not be set aside for the improper admission of evidence by the trial court, which could not have prejudiced the objecting party. *Browder v. Southern R. Co.*, 10.
15. *Motion to Strike Out—Specifications of Objections.*—A motion to strike out the testimony of a witness on a particular subject, which has been received without objection, is properly rejected if the party moving fails to point out the specific answer objected to. *Douglas L. Co. v. Thayer Co.*, 292.
16. *Non-Production of Writing—Presumption—Excuses.*—Where it develops during the trial of an action at law that there is in the possession of the plaintiff a written contract affecting his right to recover in the action, no presumption will be indulged against him on account of his non-production of the paper where it appears that he was not called upon to produce it, had no notice of any defense which would render the contract material, and, where it does not appear that it was within his power to produce it during the trial. This is especially true on a demurrer to the evidence by the defendant. *Rochester Ins. Co. v. Monumental Ass'n*, 702.
17. *Objection to Question—Ignorance of Witness on the Subject.*—An exception to the action of the court in excluding a question propounded to a witness, is immaterial where it appears from the answer of the witness that he has no knowledge on the subject. *Douglas L. Co. v. Thayer Co.*, 292.
18. *Opinion Evidence—Experts.*—Subject to proper restrictions based on their experience and knowledge, witnesses may give their opinion as to the distance within which a locomotive engine may be stopped. *Wise Terminal Co. v. McCormick*, 376.
19. *Opinions of Non-Experts—Impressions.*—A witness must, as a rule, state facts and not his opinions, but, if the constituent facts cannot be fully placed before the jury, a witness who has had adequate opportunity for observation may, after enumerating such of the constituent facts as he can, state the effect on his mind of the numerous phenomena which constitute the impression of appearance, whether of animate or inanimate objects, as that a substance which he had seen and examined was grease, or that a mustache worn by a man was a false mustache, or that a bottle found near

the place of a homicide was the same previously seen in the possession of the accused. *Richards v. Com'th*, 881.

20. *Parol Evidence—Deed in Fee—Consideration—Parol Agreement to Provide Right of Way.*—A land owner who has conveyed to a railroad company a fee simple, unencumbered, title to a strip of land, with covenants against encumbrances and for quiet enjoyment, will not be permitted to show, as a part of the consideration for the deed, a prior or contemporaneous parol agreement on the part of the company to construct a private right of way over the land conveyed, under the company's track, as a passway for his cattle. This would be, in effect, the reservation of an easement of the right of way, or a covenant to provide it, and parol evidence is not admissible to add any covenant to a deed, or to enlarge or contradict any covenant, or to create a reservation. *Trout v. Norfolk & W. R. Co.*, 576.
21. *Parol Evidence Rule—Surrounding Facts and Circumstances.*—Parol evidence will not be received to vary, alter, or contradict the terms of a valid written instrument, but where the language of a contract is ambiguous, or its construction doubtful, courts are not shut out from the same lights which the parties enjoyed when the contract was executed, and, in order to ascertain the intention of the parties, may hear evidence of the surrounding facts and circumstances so as to place themselves in the same situation which the parties who made the contract occupied, and thus judge of the meaning of the words and their application to the things described. *Albert v. Tidewater R. Co.*, 256.
22. *Parol Evidence to Show Alteration of Writing.*—Parol evidence is admissible to show that, after an unsealed paper had been executed, delivered and recorded, a scroll, by way of a seal, was affixed to the name of the maker, both on the original paper and on the record, without the knowledge or consent of the maker. *Burnette v. Young*, 184.
23. *Parol Evidence to Vary Legal Import of Deed.*—In an action to recover the consideration of a deed, the consideration actually paid or promised can be shown by parol to have been other than that recited in the deed, or the fact of the payment of the consideration agreed may be contradicted, but parol evidence is inadmissible to alter or contradict the legal import of a deed. The legal import of a deed can no more be contradicted by parol evidence than its actual expressions. *Trout v. Norfolk & W. R. Co.*, 576.
24. *Performance—Reasonable Time—Evidence—Case at Bar.*—Upon the facts of this case, while neither scarcity nor inability to get hands or timber could excuse the plaintiff from the performance of his contract in a reasonable time, still evidence of such scarcity or inability was admissible, to be considered along with all the other evidence in the case, in determining what constituted a

reasonable time within which the plaintiff was to perform his contract. *Norfolk & W. R. Co. v. Duke*, 764.

25. *Relevancy—Wills—Probate.*—On a motion to admit a will to probate, where the only issue is undue influence, the propounder cannot be asked if she wants to hold on to all of the property of the testator, to the exclusion of his children. The evidence is irrelevant to the issue, or to the due execution of the will. *Wallen v. Wallen*, 131.
26. *Survivor of Transaction—Death of Agent—Testimony of Third Person.*—The death of the agent of one party will not exclude a third person from testifying as to a conversation with such agent in his lifetime, if the conversation is otherwise competent evidence. *Douglas L. Co. v. Thayer Co.*, 292.
27. *Testimony at Former Trial—Non-Availability of Witnesses.*—In order that proof may be admitted of what a witness stated at a previous trial between the same parties and upon the same issue, sufficient reason must be shown why the original witness is not produced, as that he is dead or out of the state, or that diligent enquiry for him where it is most likely that he would be found has proved unavailing, or that the opposite party has caused his absence, and the evidence on this subject should be complete and satisfactory. In the case at bar, the evidence on the subject of the non-availability of the witness falls short of these requirements. *Wise Terminal Co. v. McCormick*, 376.

See APPEAL AND ERROR, 8, 21; BOUNDARIES, 2, 4, 5, 6, 8, 9, 10, 11, 12; CONTRACTS 4; CRIMINAL LAW, 5, 13, 14, 15, 20, 21, 22, 23, 25, 30; EQUITY, 8; HIGHWAYS, 1; LIMITATION OF ACTIONS, 3; QUIETING TITLE, 2; VENDOR AND PURCHASER, 4; WILLS, 6, 7, 8, 9, 10; WITNESSES, 2, 3, 4.

## EXECUTORS AND ADMINISTRATORS.

1. *Administration—Right to Qualify—Distributees—Legatees—Code, Sections 2637 and 2639.*—When the executor of a will refuses to qualify, the right of administration is conferred upon the decedent's distributees by sections 2637 and 2639 of the Code, and they are allowed to waive it in favor of any other person to be designated by them: and, when the distributees have designated such a person, a legatee and devisee who is not a distributee has no right to qualify or to designate who shall. The word "distributees," as used in section 2639, means those who would be entitled under the statute of distributions to the personal estate of the decedent if he had died intestate, and does not embrace legatees and devisees. But distributees who recognize the preferable right of the widow to qualify, if the court deems her a proper person, do not thereby waive their right to qualify, or to designate who shall, in the event

the court denies the application of the widow to qualify. *Smith v. Lurty*, 548.

2. *Administration—Right of Widow to Qualify—Refusal—Designation of Another—Code, Sec. 2639.*—A widow, though otherwise entitled to the preferable right to qualify as administratrix with the will annexed of her husband, is properly refused the right to qualify where it appears that she is hostile to, and not on speaking terms with, the principal devisee and legatee under the will, is litigating with the curator of her husband's estate, and is asserting title to property which the husband attempted to dispose of by his will; nor, having been refused the right to qualify, can she designate the person to be appointed. Section 2639 of the Code does not confer this right upon her under such circumstances. *Smith v. Lurty*, 548.
3. *Payments to Distributees.*—Under the circumstances of this case, and there being no evidence of unsatisfied debts against the estate of the testator, nor of costs and charges superior in right to the widow's claim as a distributee, it was not error to decree to her out of the fund in hand the immediate payment of a large part of the sum to which she was entitled as a distributee of her husband's estate. *Showalter v. Showalter*, 713.
4. *Priority of Debts—Guardian De Son Tort.*—The wards of a guardian *de son tort* are not entitled, under Code, section 2660, to any priority over the general creditors of such guardian in the administration of his personal estate after his death. The language of that section plainly accords priority only where there has been a qualification, and that qualification has been in this state, and cannot be extended by construction. *Watts v. Newberry*, 233.

See WILLS, 1.

EXPERTS. See EVIDENCE, 19.

FORFEITURES. See BENEFIT ASSOCIATIONS, 1, 2.

FRAUD AND FRAUDULENT CONVEYANCES.

1. *Deeds—Undue Influence—Burden of Proof—Case in Judgment.*—Undue influence to invalidate a deed or will must be such as to overcome the will and control the judgment of the grantor or testator. The proof must show that the act was procured by coercion, by importunity which could not be resisted, and that the motive was tantamount to force or fear. The burden of proving undue influence is always on him who alleges it. In the case in judgment, the evidence does not sustain the charge. *Hoover v. Neff*, 441.
2. *Deeds—Undue Influence—Conveyance by Wife to Husband.*—The fact that the grantee in a deed is the husband of the grantor is a cir-

cumstance to be considered in determining whether the deed was procured by undue influence, but that fact alone would not justify the annulling of the deed. *Hoover v. Neff*, 441.

3. *Representations of Fact or Opinion*.—Whether a misrepresentation is one of fact or opinion is not always easily determined. The relative knowledge of the parties dealing, their intentions, and all of the surrounding circumstances affect the interpretation, and hence, are to be considered. In the case in judgment, the representations alleged in the bill were sufficient to entitle the complainant to a hearing, and the demurrer should have been overruled. *Garrett v. Finch*, 25.
4. *Voluntary Conveyances—Deed to Wife—Consideration Paid by Husband—Case in Judgment*.—The evidence in this case establishes the fact that the only consideration for the deed to a wife was a debt due by the grantor's ancestor to her husband. The deed, therefore, was, in effect, a gift of the land from her husband, and as such was voluntary and void as against his then existing creditors. *Cramer v. Senger*, 400.
5. *Voluntary Conveyances—Void as to Existing Creditors of Grantor—When Debt Contracted—Case in Judgment*.—The evidence further establishes the fact that the complainant's debt was contracted long before the date of the voluntary settlement on his wife. The debt grew out of a contract made three years before the date of the deed, under which contract the husband received money from the complainants fraudulently and wrongfully, which they had the right to demand and recover of him. It is immaterial that the adjustment of the account between the parties was not made till after the date of the deed. That would not change the fact that the husband was the debtor of the complainants prior to that time. The grantor being thus indebted at the time of the voluntary conveyance to his wife, the land conveyed is liable for the debt. *Cramer v. Senger*, 400.

See BANKRUPTCY, 1; CANCELLATION OF INSTRUMENTS, 1; EQUITY, 12, 15; EVIDENCE, 12, 25; TRUSTS AND TRUSTEES, 5, 6; WILLS, 8, 9, 10.

GUARDIAN AND WARD. See EXECUTORS AND ADMINISTRATORS, 4.

## HIGHWAYS.

1. *Evidence—Burden of Proof—Street Railways*.—In an action to recover damages from a street car company for an injury negligently inflicted on a traveller on an alleged public highway, the burden is on the plaintiff to show that the *locus in quo* was a public highway. *Lynchburg Traction Co. v. Guilh*, 86.



### HOMESTEADS.

1. *Judgment for Breach of Contract—Tort—Fraud.*—Where the right of recovery in an action is rested solely upon the ground that the plaintiff has been damaged to a certain amount by a breach of contract on the part of the defendant, and not by reason of a tort, the mere use of violent terms in characterizing the alleged fraud in the procurement of the contract, and its breach, will not suffice to convert the breach of the contract into a tort. Against a judgment obtained in such an action the defendant may claim the benefit of the homestead exemption. *Jewett v. Ware*, 802.

### HUSBAND AND WIFE.

1. *Property Held Under Act March, 1900—Liability for Husband's Debts.*—The Act of March, 1900, declaring that all property of married women theretofore or thereafter acquired should be free from the debts and liabilities of their husbands is, so far as it affects debts and liabilities of husbands created after the date of the act, a valid exercise of legislative power, although the act preserves the husband's right of curtesy. The legislature has power to abolish credit altogether. *Chilton v. Hannah*, 661.
2. *Tenancy by Marital Right—Liability for Debts.*—At common law the husband, immediately upon marriage, became entitled to the rents, issues and profits of the wife's freehold lands, independent of birth of issue. The right was vested by the marriage, and the interest of the husband was liable for his debts. *Chilton v. Hannah*, 661.

See FRAUD AND FRAUDULENT CONVEYANCES, 2, 4, 5; WITNESSES, 2.

### INFANTS.

1. *Guardian ad Litem—Next Friend.*—A guardian *ad litem* may appeal in the names of the infants, by himself as such guardian, from a decree adverse to their interest, but if he fails to do so, the infants may appeal by some one as their next friend. *Givens v. Clem*, 435.
2. *Marriage Settlements—Disaffirmance.*—If an infant *feme*, upon the eve of her marriage, unites with her intended husband in settling her real estate upon herself and the contemplated issue of such marriage, the act is voidable, and can be disaffirmed by her, when the disabilities of infancy and coverture have been removed, where she has, in the meantime, done no act to ratify or affirm such settlement. *Tabb v. Archer*, 3 Hen. & M. 399 is disapproved so far as it conflicts with this case. *Smith v. Smith*, 112.

See TRUSTS AND TRUSTEES, 1, 2.

### INJUNCTIONS.

1. *Equity Jurisdiction—Settlement of Accounts—Remedy at Law—County Treasurers—Defaults on Different Bonds.*—Where sundry

motions for judgments are pending against a county treasurer and the sureties on different bonds covering different periods, and it is claimed that the balances shown by his settlements during his first term were mere paper balances, and that he had squandered the public funds, and had used the revenue received during a second term to pay off delinquencies accruing in the first term, a surety for the second term may go into a court of equity and have the proceedings on said motions enjoined, and proper accounts settled so as to ascertain in what fiscal years the defalcations accrued and the amounts thereof, and settle and determine the rights and liabilities of the sureties and co-sureties on the several bonds. It may be that such surety might have been able to make his defense at law, but it is plain that his remedy there is far less complete and adequate than in equity. *U. S. Fidelity Co. v. Jordan*, 347.

See STATE CORPORATION COMMISSION, 1.

INSANE PERSONS. See CRIMINAL LAW, 18.

#### INSTRUCTIONS.

1. *Contradiction*.—If contradictory instructions on a material point in a case have been given, the verdict should be set aside, as it cannot be known by which the jury were controlled. *Southern R. Co. v. Hansbrough*, 733.
2. *Correct Verdict—Ruling on Instructions*.—The action of the trial court in granting an instruction becomes immaterial when in no view of the case could there have been a different verdict. *Bugg v. Seay*, 648.
3. *Evidence to Support*.—An instruction is properly refused when predicated on the existence of a fact denied by the testimony of the party offering the instruction. *Grasty v. Lindsay*, 428.
4. *Lack of Evidence to Support—Surmises*.—An instruction which permits the jury to look beyond the evidence to establish care and diligence on the part of the plaintiff, and negligence on the part of the defendant, is harmful to the defendant, and is not rendered harmless by the fact that an instruction is given at the instance of the defendant which sets forth his version of the law applicable to the facts dealt with in the plaintiff's instruction given over the objection of the defendant. *Southern R. Co. v. Hansbrough*, 733.
5. *No Evidence to Support*.—An instruction should not be given when there is no evidence in the case which tends to support it, as it simply misleads the jury, and thereby constitutes reversible error. *Norfolk & W. R. Co. v. Stegall*, 231.
6. *No Evidence to Support*.—It is error to give an instruction when there is no evidence in the case which tends to support it. *Southern R. Co. v. Hansbrough*, 733.

7. *Jury Fully Instructed—Refusing Other Correct Instructions.*—When the instructions given fully and fairly submit the case to the jury, it is not error to refuse to give other instructions tendered, although they may contain correct statements of the law as applied to the case. *Richards v. Com'th*, 881.
8. *Jury Sufficiently Instructed.*—The refusal of an instruction, even though it correctly propounds the law, is not ground for reversal of a judgment if other instructions given upon the same subject correctly propound the law, and are sufficient to enable the jury to apply the facts correctly. *Merryman v. Hoover*, 485.
9. *Jury Sufficiently Instructed—Harmless Error.*—If the instructions given in a case are correct and fully cover the case, and are sufficient to enable the jury correctly to apply the evidence, it is not error to refuse to give other instructions offered, even though they correctly propound the law. It is a case of harmless error. *Ches. & O. R. Co. v. Fortune*, 412.
10. *Needless Multiplication.*—As every instruction unnecessarily given increases the chances of a reversal, the multiplication of instructions should be avoided as far as possible. *Wallen v. Wallen*, 131.
11. *Negligence—Contributory Negligence—Avoiding Consequences—Instructions.*—In the absence of any evidence of negligence on the part of the defendant, after it discovered, or ought to have discovered, the peril of the plaintiff, it is error to instruct the jury on the subject of the discovered or discoverable peril of the plaintiff. *Southern R. Co. v. Hansbrough*, 733.
12. *Partial View of Evidence.*—An instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue. *Douglas L. Co. v. Thayer Co.*, 292.

See APPEAL AND ERROR, 7, 14, 20.

## INSURANCE.

1. *Fire Insurance—Clause Against Encumbrances—Breach—Recorded Lien—No Representations—Return of Premium.*—Where a policy of fire insurance provides that the policy shall be void if the property insured be or become encumbered by any lien by mortgage, deed of trust, judgment or otherwise, prior or subsequent to the date of the policy, and at the date of the insurance there is a deed of trust on the property, duly recorded, the policy is avoided thereby, if the company had no other knowledge of such deed, although the application for the insurance was verbal and no questions were asked, and no representations made by the assured as to encumbrances. The assured, by acceptance of the policy, is charged with notice of its contents and bound by its conditions, and the company, by issuing the policy without inquiry, does not

waive the condition as to title or encumbrances, unless the facts were known to the company or its agents when the policy was issued, or the company was chargeable with such knowledge; nor is the company obliged to return, or offer to return the premiums voluntarily paid as a condition precedent to availing itself of its defense to an action on the policy. *Va. Fire & M. Ins. Co. v. Case*, 588.

2. *Fire Insurance—Sole Ownership of Property—Options—Conditional Sales—Enforceable Contracts.*—Although an insurer of property may have given an option upon it, or made a conditional sale of it, if he cannot specifically enforce his option or contract, he is still the "unconditional and sole owner" of the property, and the risk of loss by fire is his. *Rochester Ins. Co. v. Monumental Ass'n*, 701.
3. *Fire Insurance—Unconditional and Sole Ownership—Burden of Proof.*—The burden is upon the insurer to show that when a policy was issued, the insured was not the unconditional and sole owner of the property insured, if that fact be in issue. *Rochester Ins. Co. v. Monumental Ass'n*, 671.

See BENEFIT ASSOCIATIONS, 1, 2, 3; DEMURRER TO EVIDENCE, 3; PLEADING, 4.

## INTERSTATE COMMERCE.

1. *Furnishing Empty Cars—Car Service—Rule I Unreasonable Burden.*—Rule I prescribed by the State Corporation Commission for the government of transportation companies and shippers doing business in this state, which requires such companies unconditionally to furnish empty cars to shippers within four days after application therefor and imposes a penalty for its violation, in so far as it applies to interstate shipments, imposes an unreasonable burden on interstate commerce, and is in conflict with the Act of Congress regulating interstate commerce. Where such burden is imposed it is immaterial what mode of procedure is adopted to enforce the rule, or what penalty is prescribed. *Southern R. Co. v. Commonwealth*, 771.
2. *Furnishing Empty Cars—Regulations.*—Furnishing empty cars for an interstate shipment is a necessary part of interstate commerce, and a statute which undertakes to regulate the time, manner and conditions under which such cars shall be furnished, is a regulation of an essential part of interstate commerce. *Southern R. Co. v. Commonwealth*, 771.
3. *Furnishing Cars—Reasonable Regulations by States.*—A state may, in the absence of action by Congress, prescribe rules and regulations for transportation companies and shippers in the matter of

furnishing and loading cars for interstate shipments, provided such rules and regulations be reasonable and just, and do not in their application directly infringe upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected thereby. For divergence of opinion on this point, see separate opinions of judges. *Southern R. Co. v. Commonwealth*, 771.

INTOXICATING LIQUORS. See CRIMINAL LAW, 19, 20, 21, 22, 23, 24, 25.

ISSUE OUT OF CHANCERY. See EQUITY, 9, 10, 11.

JUDGMENTS. See PARTITION, 2.

JUDICIAL SALES.

1. *Upset Bid—Confirmation.*—A judicial sale will not be set aside merely because an upset bid of a larger sum is offered. If the terms of the decree of sale have been complied with, and the land has been sold under favorable circumstances and has brought a fair price, and confirmation is recommended by the commissioners who made it, the sale should be confirmed. This is especially true where the party objecting to the confirmation and tendering the upset bid, was present at the sale and had ample opportunity to bid. Stability and confidence in judicial sales will, in this way, be best promoted, and the best price for property offered at such sales will be thus obtained. *Watkins v. Jones*, 6.

See TRUSTS AND TRUSTEES, 1, 2.

JURISDICTION. See CRIMINAL LAW, 3.

JURY.

1. *Incompetency—Objection After Verdict.*—The objection that a juror is not competent because of some personal incapacity, comes too late after verdict, and is not good ground for a new trial. *Thurman v. Com'th*, 912.

See CRIMINAL LAW, 6, 26, 34.

LACHES. See EQUITY, 12.

LANDLORD AND TENANT.

1. *Cancellation of Instruments—Case in Judgment—Defective Title of Lessor—Notice.*—The facts of this case do not warrant a rescission of the executed contract of lease in controversy, even if the lessor did not have complete title to an insignificant part of the leased premises at the time the lease was made. Notice to the husband

of the lessor of the defective title and of the lessee's desire or intention to rescind was no notice to the lessor, who had executed the lease in person which the husband had no power to make. No notice was given to the lessor herself until eighteen months after the discovery of the defect, which was then immediately remedied. *Finch v. Causey*, 124.

2. *Distress—Abandonment—Second Distress—Character of Statutory Distress.*—The abandonment of a distress warrant for rent actually due, after levy and before removal or sale of the property, or other injury to the tenant, is no bar to a second distress warrant for the same rent under the statutes of this state, even if it were otherwise at common law. The proceeding under the statute is judicial in its character, and the rights of the tenant are thoroughly protected. The landlord is no longer "his own carver," as at common law. *Wickham v. Richmond Spike Co.*, 44.
3. *Mill Site and Water—Separate Values—Distress for Whole.*—It is unnecessary, in this case, to determine whether or not water drawn from a natural stream and conveyed into a permanent, artificial canal, and appropriated to useful purposes, is *per se* demisable, for where, as in this case, the covenants in a lease of a mill site, with sufficient water from an artificial canal to operate the mill, are interdependent, the mere fact that the parties have chosen to fix separate values on the use of the land and of the water, is immaterial, and the whole may be recovered by distress. *Wickham v. Richmond Spike Co.*, 44.
4. *Rent—Use of Personal Property as Part of Consideration.*—The presence of personal property upon land, to be used in immediate connection with the land and essential to its enjoyment for the purposes for which the land is leased, may immeasurably increase the rental value of the land, and the return for the use of both properties may be stipulated for as rent, and, in case of default, may be distrained for. *Wickham v. Richmond Spike Co.*, 44.

## LICENSES.

1. *Scenic Performances—How Classed.*—A panoramic reproduction of the battles of the Boer war, with scenery of the war country and military and other equipments like those seen in the battle portrayed, unaccompanied by circus rings, trapeze acting, clowns or a menagerie, is not subject to the high license tax imposed upon "shows, circuses and menageries" mentioned in chapter 148 of Acts 1902-3, but to the lower tax imposed by said Act upon theatrical and other similar performances. The fact that the price of admission is the same as that charged by "circuses and other first class shows" is immaterial. *Boer War Spectacle v. Commonwealth*, 653.

## LIMITATION OF ACTIONS.

1. *Acknowledgment Under Seal*.—The three-year limitation is inapplicable to a debt evidenced by writing under the signature and seal of the debtor. If the antecedent debt were a mere assumpsit, it is merged in the specialty. *Lurty v. Lurty*, 466.
2. *Limitation of Actions—Disability of Tenant in Common*.—The disability of one tenant in common will not prevent the statute of limitations from running against other tenants in common not laboring under any disability. *Merryman v. Hoover*, 485.
3. *New Promise—Acknowledgment—Evidence—Burden of Proof—Survivor of a Transaction*.—Where a husband sells personal property owned by himself and wife jointly, and takes the note of R., the purchaser, therefor, payable to himself, and then renders her a statement in writing over his signature, showing that her share of the sale amounted to a sum stated, "which is due you out of R.'s note when collected," this establishes the fact that the husband was the wife's agent in the transaction, and the language used is an acknowledgment that he will be due his wife the sum stated when the note is paid, from which the law implies a promise to pay. The burden is on the wife to show the subsequent payment of the note and the date of payment, and this may be shown by the maker of the note, notwithstanding the death of the husband, in an action by her against the curator of her husband's estate. The limitation on such acknowledgment is five years, as it is "a contract by writing, signed by the party to be charged thereby." *Lurty v. Lurty*, 466.

MARRIAGE. See INFANTS, 2.

MARRIED WOMEN. See HUSBAND AND WIFE, 1.

## MASTER AND SERVANT.

1. *Independent Contractor—Privity—Case at Bar*.—Where a contractor enters into an agreement with the owner of a lot, whereby he engages to purchase the material, employ the labor, and superintend and erect a building for the owner, in accordance with plans in hand, and at an agreed price, and to render a true account of purchases and pay-rolls; to use his best efforts to secure material and labor at the lowest cost; and guarantees that the workmanship shall be first-class in every respect; and in consideration thereof, the owner agrees to pay the net cost of the material and labor, and to pay the contractor a stated sum, which is designated a commission, these facts constitute the contractor an independent contractor, and he alone can sue a third person for the damages resulting from the negligent construction of a portion of the building under a contract made with him. *Veitch v. Jenkins*, 68.

2. *Infant Servants—Rule Excluding—False Representation as to Age.*—A general rule of a railroad company which forbids the employment of infants in its train service, is a reasonable rule, and an infant who, with knowledge of such rule, obtains service with the company by falsely representing himself to be of age, and is injured in the course of such service by reason of the negligence of the company's servants, cannot recover damages of the company for such injury, although his infancy in no way contributed to his injury. His position is that of a trespasser, or at most a bare licensee, to whom the company stands in no contractual relation and owes no other duty than not to injure him recklessly, wantonly or wilfully. *Norfolk & W. R. Co. v. Bondurant*, 515.
3. *Negligence of Servant.*—A master is under no greater obligation to care for the safety of his servant than the servant is to care for himself, and if the servant's negligence is the proximate cause of his injury, he cannot recover of the master. *Pittard v. Southern R. Co.*, 1.
4. *Railroads—Fellow Servants—Constitutional Provision—Yard Master Riding on Switching Engine—"Requiring."*—If the presence of a yard master on a switching engine is in the usual and proper discharge of his duties, he is rightfully there, and is entitled to the benefit of the protection afforded him by the constitutional provision abolishing the fellow-servant doctrine as to every employee engaged in any service requiring his presence on a train, car or engine. The word "requiring" will not be given such a restrictive meaning as to exclude employees of this class. *Southern R. Co. v. Smith*, 553.
5. *Railroads—Fellow Servants—Yard Master and Engineer—Former Law.*—A yard master of a railroad company, who had no power to employ or discharge servants, but who directed the movements of trains on the yard, the shifting and changing of cars and the making up of trains, and who possessed none of the powers of a vice-principal, was a fellow servant of an engineer running an engine on the yard as the law stood prior to the adoption of the present constitution. *Southern R. Co. v. Smith*, 553.
6. *Railroads—Fellow Servants—Yard Master and Engineer Present Law.*—The present constitution has abolished the fellow-servant doctrine in cases like that stated in paragraph 5 above, and the company is liable for an injury inflicted on a yard master through the negligence of the engineer. *Southern R. Co. v. Smith*, 553.
7. *Safe Appliances—Inspectors—Defects to be Looked For.*—The duty of the master to use ordinary care to provide reasonably safe, sound and suitable machinery and appliances for the use of his servants, applies as well to car inspectors and repairers as to other servants, where the machinery or appliance provided is other than the thing to be inspected or repaired. In the latter case, there can be no recovery for injuries sustained because of defects



in such machinery or appliances if the servant neglects his duty of inspection, and the defect is such as is discoverable by proper inspection. *Browder v. Southern R. Co.*, 10.

See RAILROADS, 7, 12.

MERGER. See VENDOR AND PURCHASER, 1.

#### MINES AND MINERALS.

1. *Erroneous Assessment—Motion to Correct—Allegations not Denied—Corporation Commission.*—Where the notice of a motion under Sec. 437a of the Code (1904) to correct an erroneous assessment of mineral lands recites that it was given "as required by the State Corporation Commission," which allegation is not denied, it must be accepted as true that the proceeding was instituted by the direction of said Commission. *Com'th v. Pocahontas Coal Co.*, 666.
2. *"Improved and Under Development."*—The phrase "improved and under development," as used in the statute for assessing mineral lands, means opened up mine entries and butt entries extending to solid coal, so as to render the land immediately accessible for practical mining. *Com'th v. Pocahontas Coal Co.*, 666.
3. *Value—Opinion of Trial Judge.*—The opinion of a trial judge as to the value of mineral lands for the purpose of taxation is entitled to great weight, where it appears that he resides in proximity to the lands, and saw the witnesses and heard them testify. *Com'th v. Pocahontas Coal Co.*, 666.

MISDEMEANORS. See CRIMINAL LAW, 27.

MISTAKE. See ADVERSE POSSESSION, 2; ESTOPPEL, 2.

MORTGAGES. See TRUSTS AND TRUSTEES, 4.

#### MUNICIPAL CORPORATIONS.

1. *Amending Charters—Constitutional Provision—General Statute.*—Section 117 of the Constitution is self-executing in so far as it amends the charters of cities and towns so as to conform to the provisions of the Constitution; and the general law for the government of cities and towns, passed in pursuance of the Constitution, which provides that for all towns there shall be elected every two years a mayor and six councilmen, who shall constitute the council of the town, operates to amend a charter granted to a town prior to the Constitution, which provided for only five councilmen, one of whom should be chosen as mayor; and the official acts of a mayor and council elected pursuant to such gen-

eral law, are valid and binding when done in pursuance of their charter powers. *Beale v. Pankey*, 215.

2. *Dissolution*.—A municipal corporation is not dissolved by the non-user or misuser of its franchise, or the failure to elect officers. The legislature alone can dissolve such a corporation. *Beale v. Pankey*, 215.

See NEGLIGENCE, 4.

MURDER. See CRIMINAL LAW, 28, 29.

## NEGLIGENCE.

1. *How Charged—Declaration*.—Negligence, as a general rule, is a conclusion of law from facts sufficiently pleaded, and the office of a declaration is to inform the defendant of the case which he has to meet, so that he may have a reasonable opportunity to prepare and make his defense. It is not enough to say that the plaintiff was injured, and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied on to establish the negligence of the defendant, for which he is to be held liable, should be stated with reasonable certainty. The declaration should state sufficient facts to enable the court to say, on demurrer, whether, if the facts stated are proved, the plaintiff is entitled to recover. Mere general averments of negligence are not sufficient. *Lynchburg Traction Co. v. Guill*, 86.
2. *Contributory Negligence*.—If the proximate cause of an injury is the negligence of both plaintiff and defendant concurring at the time of the injury, there can, as a general rule, be no recovery. The law recognizes no gradations of fault in such cases. *Smith v. Norfolk & W. R. Co.*, 725.
3. *Contributing to Injury—Instructions*.—It is not necessary that a plaintiff's negligence should have caused the injury complained of in order to defeat his recovery. It will also be defeated if his negligence proximately contributed to his injury; and where contributory negligence is relied upon as a defense, an instruction which excludes this doctrine from the consideration of the jury is erroneous. *Southern R. Co. v. Hansbrough*, 733.
4. *Municipal Corporations—Streets—Leaving Sidewalks—Walking in Gutter—Negligence*.—A pedestrian who leaves a city sidewalk, which is neither obstructed nor in an unsafe condition, but merely wet, muddy and in a disagreeable condition to walk on, and walks in and along an adjacent paved gutter constructed for drainage only, and, without exercising ordinary care for his own safety, falls into a sewer inlet made in the gutter for the purpose of drainage, is guilty of such contributory negligence as bars any recovery against the city. The necessity for such inlets is a matter of common knowledge, of which every one must take notice, and the dan-

gers or which they must guard against, even where they leave the sidewalk for sufficient cause. *Mitchel v. City of Richmond*, 193.

5. *Self-Imposed Emergency*.—The principle that a person in an emergency or great peril is not required to exercise the care required of prudent persons under ordinary circumstances has no application except in cases where the plaintiff has been placed in a situation of danger by the negligence of the defendant, not united with his own negligence. No such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment. *Smith v. Norfolk & W. R. Co.*, 725.

See CARRIERS, 1, 2, 3, 4, 5; INSTRUCTIONS, 4, 11; RAILROADS, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES, 1.

#### NEW TRIAL.

1. *After-Discovered Evidence—Counter Affidavits*.—On the hearing of a motion to set aside a verdict for after-discovered evidence, counter affidavits may be received. To warrant a new trial for after-discovered evidence, the evidence must be such as ought, on another trial, to produce an opposite result on the merits, and not merely for the purpose of impeaching or discrediting a witness on the opposite side. *Wilson v. Keckley*, 592.
2. *After-Discovered Evidence—Diligence*.—A motion for a new trial, on the ground of after-discovered evidence, will be overruled, where, as in this case, the proffered evidence was not newly discovered, or could have been produced at the former trial by the exercise of reasonable diligence. *Taliaferro v. Shepherd*, 56.
3. *Costs of Former Trial—Code, Sec. 3542*.—The provision of section 3542 of the Code requiring a party to whom a new trial is granted to pay the costs of the first trial before the second is had applies only to costs in the trial court, and not to costs in the Court of Appeals incurred upon a writ of error. But, in any event, this burden is only imposed upon the party to whom the new trial is granted, and not upon one who is forced to submit to a new trial because a verdict in his favor has been set aside at the instance of his adversary. *Southern R. Co. v. Hansbrough*, 733.
4. *Misconduct of Party Subsequent to Verdict*.—Where it appears that a defendant in an action at law, immediately after a verdict in his favor, stated that he had never lost a case and never expected to if it was left to a jury, and gave five dollars to each of the jurors, and both he and they were fined for contempt, and he thereupon paid the fine assessed upon several of the jurors, and it also appears that he attempted to bribe an important witness for the plaintiff, the trial court should set aside the verdict rendered in

his favor, notwithstanding both defendant and jurors had been punished for their contempt. *Merritt v. Bunting*, 174.

5. *Variance Between Allegation and Proof—Failure to Object to Evidence—Waiver.*—A verdict will not be set aside on account of a variance between the allegation and the proof, where the party making the motion made no objection to the admissibility of the evidence when offered, and submitted no motion to exclude it afterwards, but, on the contrary, accepted the issue irregularly tendered, and undertook to maintain his side of the case by countervailing testimony. The objection will be deemed to have been waived. *Taliaferro v. Shepherd*, 56.

See CRIMINAL LAW, 30; JURY, 1; MINES AND MINERALS, 3.

PARTIES. See APPEAL AND ERROR, 10, 19; EQUITY, 7.

#### PARTITION.

1. *Judgments—Collateral Attack—Partition—Equity Jurisdiction.*—While a suit for partition under section 2562 of the Code cannot be made a substitute for an action of ejectment, still a court of equity has jurisdiction to partition land under some circumstances, although the defendant claims title to the whole tract, when he or those under whom he claims title was a joint owner with the complainant or those under whom he claims title. If such jurisdiction is upheld by the court in the partition suit, its decree, even if erroneous, cannot be collaterally assailed in another suit. *Morgan v. Haley*, 331.
2. *Nature of Estate to be Divided—Equity Jurisdiction.*—Where a party in possession of a tract of land claims under a title paramount in time and wholly distinct from and hostile to the title of another party, who claims an undivided interest in the land under a subsequent grant from the commonwealth, the parties are neither tenants in common, joint tenants, nor co-parceners, and a court of equity is without jurisdiction to decree a partition of such land. *Preston v. Va. Mining Co.*, 245.

See ADVERSE POSSESSION, 1.

#### PARTNERSHIP.

1. *What Constitutes.*—A mere participation in profits does not always constitute the participant a partner, but if parties have a community of interest in the profits as such, if they agree that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, this makes them partners. It is not essential that the parties shall, by agreements be bound to share the losses. *Miller v. Simpson*, 476.

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2. *Good Faith—Disclosures—Case in Judgment.*—The evidence in this cause shows the existence of a partnership between the appellant and the appellees to purchase a designated piece of real estate for speculation, and that, while the relations of the parties called for the utmost good faith and fair dealing between them, the appellees, after availing themselves of appellant's plan to acquire the property, eliminated him as a possible competitor for it, carried on negotiations behind his back, and withheld from him information of the gravest importance, vitally affecting his interest, and acquired the property for themselves. Upon the plainest principles of equity and fair dealing, the appellant is entitled to participate in the profits arising from the transaction. *Miller v. Ferguson*, 249.
3. *Liability for Losses.*—If an agreement be entered into between two or more persons to form a partnership, each partner is entitled to share in the profits, and will also have to share in the losses without any provision to the latter effect in the agreement, as the law will impose that burden. *Miller v. Simpson*, 476.
4. *Purchase and Sale of Land—Statute of Frauds—Evidence.*—A partnership for the sale and purchase of land for speculation, the profits to be divided among the partners, is valid when verbally made, and the existence of the partnership and the extent of the interest of the partners may be shown by parol. *Miller v. Ferguson*, 249.

#### PAYMENTS.

1. *Application of Parties—Rights of Third Persons.*—The applications of payments made by the parties to a contract cannot, as a rule, be questioned by third persons. The right is one existing strictly between the original parties, and no third person has any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor has required it. *Kline v. Miller*, 453.

#### PLEADING.

1. *Amended Declaration—New Case—Case at Bar.*—If an amended declaration asserts rights or claims arising out of the same transaction, act, agreement, or obligation as that upon which the original declaration is founded, it will not be regarded as for a new cause of action, however great may be the difference in the form of liability asserted in the two declarations. In the case at bar, the cause and form of action are the same in both declarations, and the amended declaration merely charges the negligence complained of in varying form to meet the different phases of the evidence. *Wise Terminal Co. v. McCormick*, 376.
2. *Declaration in Tort—Sufficiency.*—A declaration in tort is sufficient which states the facts with sufficient fullness and certainty to ap-

prise the defendant of the demand made upon him, to be understood by the jury, and to enable the court to say, upon a demurrer, whether or not the plaintiff is entitled to recover, if the facts stated be proved. *Blackwood Coal Co. v. James*, 656.

3. *Debt—Nil Debet—Scope.*—If an action of debt be brought on a negotiable note against the maker thereof, and the defense is that there was annexed to the note, as a part and parcel thereof, an agreement in writing, stipulating that the note should only be payable on certain conditions, which had not been fulfilled, the defense may be made under the plea of *nil debet*. No special plea is necessary. *Nottingham v. Ackiss*, 63.
4. *Fire Insurance Policy—Non-Assumpsit.*—In an action of assumpsit on a fire insurance policy, the defendant may, under the plea of *non-assumpsit*, show a breach of conditions of the policy availing it if the interest of the assured was other than "unconditional and sole ownership," or if "any change in interest, title or possession" took place without notice to the insurer. *Rochester Ins. Co. v. Monument Ass'n*, 701.
5. *Plea in Abatement—Non-joinder of Issue—When Immaterial.*—Where there has been no formal joinder of issue on a plea, but it appears that the court to which the parties had submitted all matters of law and fact, and the plaintiff and defendant, dealt with the case as though the pleadings had been perfected; and the evidence was introduced and the case argued by counsel, and decided by the court as though the utmost formality in pleading had been observed, the plaintiff is estopped to raise the objection of the want of such joinder in this court for the first time, as it is manifest that no injury has resulted to him from the omission. *Deatrick v. State Life Ins. Co.*, 602.
6. *Plea in Abatement—Better Writ.*—As a general rule, a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the state wherein the action is brought, but this requirement is not available where the plea shows a condition of facts under which no court in the state has jurisdiction. *Deatrick v. State Life Ins. Co.*, 602.
7. *Plea to the Jurisdiction—Duplicity.*—To constitute a sufficient plea to the jurisdiction of the court, every ground of jurisdiction enumerated in the statute must be negated in the plea; and a plea which does this, is not bad for duplicity. *Deatrick v. State Life Ins. Co.*, 602.
8. *Venue—Corporation Defendant—Plea to Jurisdiction—Better Writ.*—In an action of tort against a railroad company, a plea to the jurisdiction is good which avers that the cause of action did not nor did any part thereof arise in the county in which the action is brought, and that, at the time of the issuing of the writ in the cause, the defendant did not have its principal office in said county,

and that it had no president or other chief officer residing in said county, and which further states in what county the cause of action, if any, did arise, and in what city its principal office was at the time of issuing the writ and still is. The venue of all actions in this state, whether local or transitory, is fixed by statute, and the statute declares where actions against corporations as well as individuals may be brought. *Va. & Southwestern R. Co. v. Hollingsworth*, 359.

9. *Venue—Plea to the Jurisdiction—Proof—Immateriality.*—In an action against a foreign corporation to recover a personal judgment against it, but where no attachment is sued out, it is immaterial whether the defendant did or did not have estate due it in the county where the action is brought; and, on trial of a plea to the jurisdiction, the lack of such estate need not be proved. *Deatrick v. State Life Ins. Co.*, 602.

See DEMURRER; DEMURRER TO EVIDENCE, 1; EVIDENCE, 1; NEGLIGENCE 1.

#### PRINCIPAL AND AGENT.

1. *Constructive Trust—Misrepresentations—Conveyance to Cure Defect in former Deed.*—One who falsely represents himself as the agent of another, and procures a conveyance of land in his own name, by causing his vendor to believe that the conveyance is made to cure defects in a former conveyance of the vendor to such other, is a mere trustee for the party really intended to be benefited by the grantor. *Va. Pocahontas Coal Co. v. Lambert*, 368.
2. *Powers of Special Agent.*—A special agent is one who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. His powers are to be strictly construed. He possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred, and must keep within the limits of his commission. All persons deal with such an agent at their own risk as to the extent of his powers. *Bowles v. Rice*, 51.
3. *Ratification—Agent Acting for Himself.*—Where a stranger holds himself out as the agent of another and makes a contract or does an act for that other's use or benefit, the latter may ratify. But, although a stranger may falsely represent himself as the agent of another, yet if he makes a purchase in his own name, for his own benefit and pays his own money therefor, there can be no ratification. Nor can the supposed principal, as against the alleged agent, claim the benefit of the purchase unless it was made under such circumstances as creates an estoppel, or the supposed principal has been deprived of some legal right, or been otherwise injured. *Va. Pocahontas Coal Co. v. Lambert*, 368.
4. *Representations of Agent—Admissions after Termination of Agency.*—While a principal is bound by the representations of his agent

made while negotiating a lease for him, he is not bound by the admissions of such agent made after the lease has been entered into. *Finch v. Causey*, 124.

5. *Special Agent—Power to Sell for Cash—Sale on Time.*—A power to a special agent to sell for cash at any time within thirty days, does not authorize a sale on credit, even though the credit does not extend beyond the thirty days. A mere power to sell without more, implies a cash sale. *Bowles v. Rice*, 51.
6. *Special Agents—Written Authority—Notice.*—A party dealing with an agent acting under written authority, must take notice of the extent and limits of that authority. *Finch v. Causey*, 124.

PRINCIPAL AND SURETY. See SET-OFFS, 1; VENDOR AND PURCHASER, 2.

#### PROCESS.

1. *When Sent to Another County.*—Process to commence an action can only issue to another county than that in which the action is brought when some jurisdictional fact exists under section 3214 of the Code. *Deatrick v. State Life Ins. Co.*, 602.

See APPEAL AND ERROR, 4; CONSTITUTIONAL LAW, 8; VENUE, 2.

PUBLIC USE. See EMINENT DOMAIN, 7.

#### QUIETING TITLE.

1. *Equity—Jurisdiction—Quieting Title—Who May Sue.*—Only those who have a clear, legal and equitable title to land, and are in possession thereof, can invoke the aid of a court of equity to give them peace, or dissipate a cloud on the title. If a person is out of possession but has a legal title, his remedy at law, by ejectment, is full, adequate and complete; if he has only an equitable title, he must first acquire the legal title, and then bring ejectment. *Taw Title Co. v. Denoon*, 201.
2. *Evidence—Plat and Endorsements.*—In a suit to quiet title, although the deeds under which the complainant claims title do not in terms embrace the land in dispute nor bring the lands embraced within their boundaries into physical connection with the land in dispute, still an old plat with endorsements thereon, tending to show that the land in dispute is the land of complainant, is admissible in evidence as a circumstance to be considered in determining the boundaries and title, but does not, in itself, constitute title. *Austin v. Minor*, 101.
3. *Jurisdiction in Equity and at Law—Case in Judgment.*—Courts of equity have jurisdiction to remove clouds from the title to land where the complainant has complete title and is in possession, but where the owner holds the legal title, without actual possession,



and another, who has not actual possession, asserts an adverse claim to the land, the proper remedy is an action of ejectment, and equity has no jurisdiction. In the case in judgment, neither upon the issue of title nor of possession has a case been made out which justifies the interposition of a court of equity. *Austin v. Minor*, 101.

4. *Purchaser of Part of Tract of Land Subject to Lien—Suit to Compel Enforcement of Lien.*—A purchaser in possession under a deed with a general warranty, but without any covenant against encumbrances, cannot maintain a bill against his vendor to remove a cloud upon his title created by a vendor's lien on the whole tract, of which that purchased is a part, when there is no averment of the insolvency of his grantor, or of the insufficiency of the residue of the tract to pay the lien. *Lennig v. Harrisonburg Imp. Co.*, 458.

See EQUITY, 14.

#### RAILROADS.

1. *Connections—Taking of Property—Procedure.*—Whether the crossing of the works of one railroad company by another is a "taking" within the meaning of the Constitution, cannot be determined in a proceeding before the State Corporation Commission to establish the right to cross. The right to cross, and the terms and conditions thereof, are to be first determined. After that is done, the rights of the parties can be determined upon appropriate proceedings before the proper tribunal. *Louisville & N. R. Co. v. Interstate R. Co.*, 225.
2. *Grade-Crossing—Approaching in Vehicle—Speed.*—A party approaching a railroad track in a vehicle must not approach at such rate of speed as that when he reaches a point where he can see or hear a train it is too late to make adequate use of such opportunity for looking and listening as the surroundings of the crossing will admit. *Smith v. Norfolk & W. R. Co.*, 725.
3. *Grade-Crossing—Duty of Traveller.*—It is the duty of a traveller about to cross a railroad at grade to approach the crossing carefully, and to look and listen for approaching trains in both directions from which trains may come. Not only so, but his looking and listening should be done at a time and place to render them reasonably effective. If he fails to do so and is injured by a passing train he cannot recover of the railroad company, although its servants have negligently failed to give the crossing signal required by law, unless its negligence is the sole proximate cause of his injury. The vigilance of the traveller to escape injury is commensurate with that of the railroad company to avoid the infliction of injury. *Smith v. Norfolk & W. R. Co.*, 725.
4. *Grade-Crossing—Negligence of Traveller—Presumptions.*—In an action for death inflicted by a railroad company at a grade crossing,

if the evidence tends to show negligence on the part of the plaintiff's intestate, it should be left to the jury to determine from the evidence whether or not he was guilty of negligence proximately contributing to his death, and it is error to instruct the jury that "the presumption is, though slight, that the plaintiff's intestate did his duty and what the law required of him in approaching the crossing." Where the evidence shows the circumstances under which the death was occasioned, the verdict should be based on the facts proved and upon the inferences reasonably to be drawn therefrom, and not upon presumptions. *Southern R. Co. v. Hansbrough*, 733.

5. *Grade-Crossing—Obstructed View—Negligence—Thoughtlessness.*—It is the duty of one about to cross a railroad at grade at a point where no local agency of the company has lulled him into security, to look and listen in every direction from which trains may come, and to do so at a point where looking and listening will be effective. Thoughtlessness under such circumstances is negligence. If the view of the crossing is obstructed a higher degree of care is demanded both of the traveller and of the railroad company than at other points. The vigilance must be in proportion to the known danger. *Southern R. Co. v. Hansbrough*, 733.
6. *Grade-Crossing—Obstructed View—Instructions.*—Where buildings obstruct the view of the grade crossing of a railroad, it is the duty of travellers on the highway and also of the servants of the railroad company, in approaching such crossing, to use care in proportion to the known danger; and, in an action by a traveller against the railroad company for an injury inflicted at such crossing, it is error to instruct the jury, as matter of law, that the existence of such obstruction "can in no way affect the plaintiff in this case." *Southern R. Co. v. Hansbrough*, 733.
7. *Negligence—Employees on Yard—Signals—Lookout.*—A railroad company does not owe to its employees engaged on its yards, over which engines are constantly moving, the duty of sounding whistles, ringing bells or keeping a constant lookout to warn them of dangers of which they already have knowledge. Such employees are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injury from the movement of engines and cars always to be expected. Those in charge of switching engines on a yard have the right to assume that employees on the yard who are familiar with the dangers of the place, will look out for themselves, and will not fail to leave a place of danger in time to avoid injury. There can be no recovery by an employee on a yard who negligently steps on to a track on which a switching engine and cars are moving in his direction, and who is there injured by the cars in consequence of inattention to his surroundings. *Norfolk & W. R. Co. v. Belcher*, 340.

8. *Personal Injury—Persons Walking on Track—Presumption—Duty of Company.*—The servants of a railroad company, in charge of one of its trains, have the right to assume that a grown person, in apparent possession of his faculties, seen walking on its track, will get out of the way of an approaching train, but when it is apparent that he is unconscious of his danger, it is their duty to do all they can, consistently with their higher duty to others, to save him from the consequences of his own act, regardless of whether he is guilty of contributory negligence or not. If his presence is observed by careful and experienced men operating the train, and they, in the exercise of their best discretion, do not regard him in danger, until, on getting nearer to him, he appears to be unconscious of his peril, and they then do all in their power to prevent an injury to him, though without avail, the company is not liable. *Norfolk & W. R. Co. v. Dean*, 505.
9. *Private Crossings—Proceeding under Code (1904) Sec. 1294b (2).*—The fact that owners of land adjacent to a railroad in their written request to the company demanded eight crossings, while they only designated two in their notice for the appointment of commissioners under Sec. 1294b (2), Code 1904, is not such evidence of bad faith on their part as will warrant the trial court in refusing to appoint commissioners. The railroad company is not prejudiced by the application for only two of the crossings. *Adams v. Tidewater R. Co.*, 798.
10. *Private Crossings—Roads under Construction.*—The statute providing for the appointment of commissioners to determine whether a railroad company shall be compelled to construct wagon ways across its right of way for the use of abutting owners applies as well to railroads in process of construction as to those in actual operation. The statute is remedial, and should receive a reasonable construction so as to effect the ends for which it was enacted. *Adams v. Tidewater R. Co.*, 798.
11. *Unlawful Speed—Proximate Cause of Injury.*—The unlawful rate of speed at which a train is running at the time an injury is inflicted on a traveller at a grade crossing does not create a cause of action, unless it is the sole proximate cause of the injury complained of. *Southern R. Co. v. Hansbrough*, 733.
12. *Yards—Sounding Signals—Case at Bar.*—A railroad yard is a place of ceaseless activity, where cars are being shifted and engines moved, and those engaged therein are exposed to more than ordinary danger, and should be alert to guard against such dangers. The sounding of whistles and the ringing of bells at such places is not essential for the protection of employees, but would tend to increase the confusion. In the case at bar, an employee was killed

in a railroad yard, but the evidence fails to establish negligence on the part of the company. *Pittard v. Southern R. Co.*, 1.

See CARRIERS, 2, 3, 4, 5; CONTRACTS, 1; EVIDENCE, 20; MASTER AND SERVANT, 2, 4, 5, 6; STATE CORPORATION COMMISSION, 2, 3, 4; WATERS AND WATERCOURSES, 2.

RAPE. See CRIMINAL LAW, 2, 3.

REAL PROPERTY. See DISCLAIMER.

RECEIVERS. See WILLS, 1.

RENT. See LANDLORD AND TENANT.

RECISSION. See EQUITY, 12, 15.

RES JUDICATA.

1. *Appeal and Error—Questions Invoked—Res Judicata.*—Where this court has approved an instruction which in effect construed the contract in suit to be severable, it is not error, on a second trial, for the trial court to refuse an instruction to the effect that the contract was entire. *Norfolk & W. R. Co. v. Duke*, 764.

2. *Appeal and Error—Questions Necessarily Involved—Res Judicata—Jurisdiction of Trial Court.*—When this court decides a case on its merits and remands it to the trial court for a new trial, the jurisdiction of the trial court is necessarily involved, and, after the period for rehearing in this court has passed, the decision of that question becomes the law of the case in all courts of the commonwealth. It is immaterial that the question of jurisdiction was not expressly presented and decided. It was necessarily involved. *Norfolk & W. R. Co. v. Duke*, 764.

See DEATH BY WRONGFUL ACT, 1.

SET-OFF AND RECOUPMENT.

1. *Principal and Surety—Insolvency of Principal—Set-Off by Surety.*—the surety of an insolvent principal, who subsequently becomes indebted to such principal, may, in equity, set off his liability as surety against his indebtedness as against a third person whose rights have subsequently accrued. Courts of equity always recognize the influence of insolvency on the rights of parties touching the matter of set-offs, and, in adjusting transactions between them, will regard the equities of the solvent party, and so accommodate their affairs as to minimize, as far as consistent with the rights of third persons, loss from that cause. *Childress v. Jordan*, 275.

SOCIAL CLUBS. See CLUBS, 1, 2.

SPECIFIC PERFORMANCE.

1. *Discretion—Sale by Executor—Injury to Beneficiaries.*—Specific per-

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formances rests in the sound judicial discretion of a court of equity, and will not be decreed against an executor, although he has a discretionary power of sale, where it would be prejudicial to the interests of infant beneficiaries who oppose the sale, and where the executor himself has refused to perform; but the purchaser will be left to his remedy at law against the executor. Although an executor acts in good faith, and within his powers, he will not be compelled to perform against the interest of beneficiaries, even though the court would have compelled performance between two persons acting for themselves only. *Givens v. Clem*, 435.

2. *Meeting of Minds on Subject and Terms of Contract*.—Where the court is unable from all the circumstances of the case, to say whether the minds of the parties met upon all the essential particulars of a contract, or, if they did, then cannot say exactly upon what substantial terms they agreed, or trace out any particular line where their minds met, specific performance will be refused. *Clinchfield Coal Co. v. Powers*, 393.
3. *When it will be Decreed*.—All applications for the specific performance of contracts are addressed to the sound judicial discretion of the court, regulated by established principles, and, to warrant enforcement, the contract must be clearly ascertained and distinctly proved, and must be reasonable, certain, legal and mutual, and founded on a valuable, or at least meritorious consideration; and the complainant must not have been backward, but ready, desirous, prompt and eager. *Clinchfield Coal Co. v. Powers*, 393.

#### STATE CORPORATION COMMISSION.

1. *Jurisdiction over Public Service Corporations—Public Duties—Private Rights—Injunctions*.—The constitutional provision creating the State Corporation Commission and defining its duties and powers, and the Acts of Assembly passed in pursuance thereof manifest that, so far as public service corporations are concerned, the body was created to procure from them better service for the public, and to that end the Commission was given power and authority over corporations chartered and doing business in this state in the performance and discharge of their *public duties*, but it was not intended to confer upon the Commission jurisdiction to hear and determine cases against such corporations in which the matters in controversy relate primarily to injuries to private property rights, and only affect the public incidentally. The Commission, therefore, has no jurisdiction to enjoin one public service corporation from infringing upon the private rights of another such corporation in which the public is only incidentally interested. *Newport News Light & Water Co. v. Peninsular W. Co.*, 695.
2. *Railroads—Connections—Findings of State Corporation Commission—Case at Bar*.—The constitution declares that the findings of the State Corporation Commission shall be deemed to be *prima facie*

correct, but, without invoking that provision, the evidence in this case is ample to warrant the finding of the Commission that the connection established by it between the two railroads, which are parties to this proceeding, is reasonably necessary. *Louisville & N. R. Co. v. Interstate R. Co.*, 225.

3. *Railroads—Connections—Powers of State Corporation Commission.*

—The State Corporation Commission may, under the powers conferred by section 1294d, sub-section 37 of the Code of 1904, establish as many connections between two railroads as may be reasonably necessary for the convenient interchange of traffic between such roads, and for the accommodation of said roads and the public. The section does not contemplate simply on connection at a suitable point. It is a remedial statute and should be liberally construed. *Louisville & N. R. Co. v. Interstate R. Co.*, 225.

4. *Railroads—Connections—State Corporation Commission—Appeal and Error.*

—Upon affirmance of an order of the State Corporation Commission, establishing a connection between two railroads, this court will leave it to the Commission, which has ample authority in the premises, to carry out its suggestions as to the manner in which the parties shall afford to each other proper facilities in their traffic relations. *Louisville & N. R. Co. v. Interstate R. Co.*, 225.

See INTERSTATE COMMERCE.

## STATUTES.

1. *Construction—Unambiguous Language.*—If the language of a statute is free from doubt and ambiguity, the same strictness is to be applied in its construction as is applied in construing grants and contracts between private persons. *Roanoke v. Blair*, 639.

SUNDAY. See CLUBS, 1; CRIMINAL LAW, 27, 31, 32.

## TAXATION.

1. *Funds in Court—Distribution—Payment of Taxes.*—Upon principle, and also in accordance with the provisions of Sec. 492b, Code, 1904, it is the duty of a court, before distributing a fund under its control, to provide for the payment of taxes and levies due by the debtor whose assets are being distributed. A court, as the representative of the sovereignty of the state, should make no order for the distribution of funds under its control until provision is made for the payment of taxes and levies due to the commonwealth and its municipalities. *Taylor v. Sunderlin-Meade Co.*, 787.

See APPEAL AND ERROR, 1; LICENSES, 1; MINES AND MINERALS, 1, 2, 3.

## TELEGRAPH AND TELEPHONE COMPANIES.

1. *Failure to Deliver Message—Penalties—Constitutional Law.*—If a telegraph company fails to deliver promptly a telegram sent from one point to another within this state, it is liable to the penalty imposed by section 1294h of the Code (1904), although the receiving point be a navy yard, under the exclusive legislative jurisdiction of the Federal Government. All subjects of legislation not prohibited by the Federal and State Constitutions are within the discretion of the General Assembly, and this subject is not so prohibited. *West. U. Tel. Co. v. Chiles*, 60.

## TRIAL.

1. *Argument of Counsel—Doubtful Suggestions.*—It is far better for counsel to content themselves with asking a verdict of the jury based upon the law and the evidence, without suggestions of a nature which might imperil an otherwise righteous judgment. *Lynchburg Traction Co. v. Guill*, 86.
2. *Construction of Written Contract for the Court.*—Where the relation of the parties to a contract depends upon a written contract, unambiguous in its terms, and this fact is to be determined in an action at law, brought by one of said parties against a third person, it is the province of the court to construe the contract, and, as a matter of law, to determine the relation between the parties. *Veitch v. Jenkins*, 68.
3. *Rejection of Evidence—When Harmless.*—It is unnecessary to decide whether the trial court erred in rejecting evidence, where it appears that if the rejected evidence had been received, the jury could not have found any other verdict than the one they did find. *Bugg v. Seay*, 648.

See BILLS OF EXCEPTION, 3; DEMURRER TO EVIDENCE, 1, 3; WITNESSES 1.

## TRUSTS AND TRUSTEES.

1. *Sale of Infants' Lands—Affidavits as to Property—Other Judicial Sales.*—While affidavits are admissible upon the question of the confirmation of an ordinary judicial sale, the propriety of making a sale under section 2616 of the Code, or of confirming a conditional sale, made before suit brought under that section, cannot be determined upon *ex parte* affidavits. *Smith v. White*, 616.
2. *Sale of Infants' Lands—Conditional Sale Before Suit—Confirmation—Evidence Required.*—In a suit brought under the statute for the sale of lands of persons under disabilities, a conditional sale made before suit brought may be approved and confirmed by the court as well as a sale directed, but, in either case, it must be clearly shown as a condition precedent to such confirmation or order of sale, independently of any admissions in the answers, that the in-

- terests of the infants, insane persons, or beneficiaries in the trust, as the case may be, will be promoted thereby. *Smith v. White*, 616.
3. *Tracing Funds*.—In order to recover a trust fund which has been misapplied by the person holding it in a fiduciary capacity, it must be clearly identified or distinctly traced into the property, chose in action, or fund, which is to be made the subject out of which the trust fund is to be replaced. It is not sufficient simply to trace a fund to the estate of the defaulting fiduciary. *Watts v. Newberry*, 233.
4. *Trust Deeds—Conveying Particular Interest—Inurement*.—The lien of a deed of trust on an undivided fifth interest in a tract of land, which is lost to the trust creditor by reason of a superior lien thereon, cannot be extended to a wholly different undivided tenth interest in the same tract which was not conveyed by the deed of trust, and, in fact, not owned by the trust grantor at the time the deed of trust was made. *Watts v. Newberry*, 233.
5. *Trust Deeds—Inconsistent Reservations—Accelerating Date of Sale—Fraud Per Se*.—While a deed which reserves to the grantor powers inconsistent with the avowed object of the deed, is fraudulent *per se*, a provision in a deed for the benefit of creditors of a grantor which authorizes a sale of the trust subject at an earlier date than that fixed by the deed, if desired by the grantor, is not repugnant to and inconsistent with the avowed object and purpose of the deed so as to render it invalid. *Bowling v. Davidson*, 389.
6. *Trust Deeds—Inconsistent Reservations—Fraud Per Se*.—A general deed to secure creditors is not fraudulent *per se*, because of the fact that the trustee is permitted to continue the business for six months and to extend the time for another six months, if it is demonstrated to be to the advantage of the creditors secured, but provides for a sale at any time, upon request of creditors holding as much as \$2,000 of the debts secured, or at any time the trustee deems it wise or is requested in writing by the grantor to sell. Whether or not a deed is fraudulent *per se* is a question to be determined by the court from an inspection of the deed. *Bowling v. Davidson*, 389.

See PRINCIPAL AND AGENT, 1.

UNDUE INFLUENCE. See FRAUD AND FRAUDULENT CONVEYANCES, 1, 2.

VENDOR AND PURCHASER.

1. *Merger—Union of Incumbrance and Estate*.—If the holder of an incumbrance subsequently acquires the property upon which it rests, the lien is generally thereby extinguished. but this doctrine has no application where the holder of a vendor's lien upon one tract of land purchases from the owner a wholly different tract on credit,



when there is no agreement between them for such an application. In the latter case, the owner of the incumbrance does not become the owner of the land upon which the incumbrance rests, but of an entirely different tract, and there is no such blending of interests as would occasion the merger of the lesser in the greater. *Kline v. Miller*, 453.

2. *Principal and Surety—Purchaser of Part of Tract of Land Subject to Vendor's Lien.*—The purchaser of a part of a tract of land which is subject to a vendors' lien, who has purchased with notice of the lien and taken his title subject to it and without covenant against it, but who has paid no part of it, and is in no way personally liable for its payment, is in no sense a surety for the payment of the lien. *Lennig v. Harrisonburg Imp. Co.*, 458.
3. *Recovery for Excess of Land—Immediate Vendee.*—The recovery, if any, of a vendor for the value of the excess of land sold by the acre over the quantity actually paid for, must be, in the first instance, against his vendee, before attempting to subject the land in the hands of a remote purchaser for value without notice of the claim. *Emerson v. Stratton*, 303.
4. *Sale in Gross—Evidence.*—Every sale of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the parties intended a sale in gross, is presumed to be a sale by the acre. This presumption, however, may be overcome by evidence that the parties agreed to be governed at all events by the estimated quantity. Such evidence does not contradict or vary the deed, but merely establishes an understanding collateral to the written contract, and makes it clear that no such mistake was made as furnishes ground for relief in equity. *Emerson v. Stratton*, 303.
5. *Sale in Gross—Lump Sum—Lapse of Time—Frequent Alienations.*—When the purchase price for land is not an equi-multiple of the number of acres, it is, at least, persuasive evidence that the contract was not by the acre. If, in addition to this, a round sum is stated in the deed as the consideration for the land, and it is not clearly proved that there was any mutual mistake as to quantity, and there has been great lapse of time since the alleged mistake was made, and frequent alienations of the property founded on the assumption that there was no mistake, a court of equity, in the absence of any allegation or proof of fraud, will hold the transaction to have been a sale in gross and not by the acre. *Emerson v. Stratton*, 303.

See DEEDS, 2; EJECTMENT, 5; PRINCIPAL AND AGENT, 1; QUIETING TITLE, 4.

#### VENUE.

1. *Foreign Corporation—Doing Business in State.*—A foreign corporation may be sued on a transitory cause of action wherever it is

doing business in such a manner, and to such an extent, as to warrant the inference that, through its agents, it is present. *Deatrick v. State Life Ins. Co.*, 602.

2. *Foreign Corporations—Service on Statutory Agent.*—Where none of the grounds of jurisdiction enumerated in sections 3214 and 3215 are present, an action against a foreign corporation must be brought where the statutory agent of the corporation resides. It cannot be brought in another county or city, and have process sent to the county or city in which such statutory agent resides. *Deatrick v. State Life Ins. Co.*, 602.

See CRIMINAL LAW, 5, 6; PLEADING, 8, 9.

#### VERDICTS.

1. *Evidence to Support.*—This court will not set aside the verdict of a jury if there was sufficient evidence to sustain it. *Norfolk & W. R. Co. v. Duke*, 764.

See DAMAGES, 1, 2; INSTRUCTIONS, 2.

WARRANTIES. See COVENANTS, 1, 3.

#### WATERS AND WATER COURSES.

1. *Change of Course.*—The owner of land may change the whole course of a stream within the limits of his own land, provided he restores the water, undiminished, to the original channel before leaving his own premises, and other persons are not injured by such diversion. *Cook v. Seaboard Ry.* 32.
2. *Flood Waters—Culverts—Case at Bar.*—Where the proprietor of land changed the course of a stream through his own land and then returned it to its original channel, before leaving his land, and constructed a wasteway, to carry off the surplus water, in case of freshets, both of which appeared to be permanent, and some years thereafter a railroad company constructed its road-bed across said channel and wasteway, it was the duty of the company to provide for the escape of the water through the wasteway as well as through the channel, although the proprietor may have originally intended to change the location, at some future time, of said artificial channel. The company should have adapted itself to existing conditions, which could not thereafter have been changed to its prejudice. Flood water, which overflows from a natural stream, is not surface water, and a railroad company is liable in damages for injuries resulting from its failure to construct proper culverts to carry it off where its embankments would otherwise obstruct its passage. *Cook v. Seaboard Ry.*, 32.
3. *Overflow—Change of Course.*—The right of a land owner, under circumstances like those in this cause, to change the course of the

superabundant water produced by freshets, is not less clear than his right to change, on his own land, the course of the ordinary stream. *Cook v. Seaboard Ry.*, 32.

See EMINENT DOMAIN, 9, 10.

#### WHARVES.

1. *Steamboats—Wharfage—Public Use—Code 1904, Section 12940—Constitutional Law.*—If a steamboat wharf is leased to a steamboat company for a percentage of all freight and passenger traffic over the wharf, but no charges are made by either the owner or lessee for the use of the wharf, but the public is permitted to use it without compensation, such wharf is not within the intendment of section 12940, Code 1904, requiring certain accommodations to be provided and imposing a penalty for the neglect thereof. The provision of the section that it is "not to apply to any wharf where no wharfage is charged," means no wharfage to the public. The public is not affected by such a use of a wharf as is above described, and any attempted regulation of its use would be an unwarrantable invasion of private rights. *Hunter v. Com'th.*, 909.

#### WILLS.

1. *Appointment of Curators—Receivers.*—An order of a court of chancery appointing a receiver of an estate pending litigation over a will, will be treated as an appointment of a curator under Sec. 2534, Code 1904, when it appears that the appointment was made after notice, upon a bill supported by affidavit, the allegations of which are not denied by pleading, affidavit, or otherwise. *McCurdy v. Smith*, 757.
2. *Construction—Case in Judgment—Release of Debt—Legatee not Indebted.*—A testatrix, by a codicil to her will, says: I direct that any note or notes, bond or bonds, or other evidences of indebtedness which may remain unpaid at the date of my death from the following named individuals, viz.: A, B, X, Y and Z, my executor shall cancel and surrender all such obligations to the obligors in full satisfaction and payment thereof. At the time of her death, the testatrix held the pecuniary obligations of all the persons named, for money loaned, except Z, her second cousin, who was the only one of them in any way related to her. At that time, Z was indebted to L for borrowed money, in the sum of \$7,000, evidenced by bonds not then due, which were never owned by the testatrix and had never been her property. Z claimed that it was the duty of the executor to purchase these bonds and cancel and surrender them to her, for in this way only could she be benefited by the will.  
*Held:* That such was not the duty of the executor. The testatrix intended to forgive debts due to her at the date of her death. They might be incurred after the date of the will, but must be debts due to her and not to others. The words "cancel" and "surrender" in

the connection in which they are used, would be inapplicable to debts due by Z to a third person. *Brown v. Gibson*, 383.

3. *Construction—Gift to Wife and Children.*—A testator, by his will, declares: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She may, however, dispose of the whole amount by will, to take effect after her death, in the arrangement of which I desire her to take the advice of her husband."

*Held:* The wife and children, except the two elder sons, are jointly entitled to the income of the property during her life, and if she fails to dispose of the *corpus* by will, then it will pass to the said children and the heirs of the wife jointly. *Smith v. White*, 616.

4. *Construction—Meaning of Words Used.*—Where the language of a will, taken as a whole, is clear and unambiguous, the safest mode of construction is to adhere to the words of the will. The true inquiry is, not what the testator intended to express, but what the words used do express. *Brown v. Gibson*, 383.

5. *Election by Widow—Devise of Wife's Land—Dower—Code, Sec. 2271.*—Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases. The provisions of Sec. 2271 of the Code have no application to such a case. *Showalter v. Showalter*, 713.

6. *Election of Widow—How Made—Evidence of Election—Case in Judgment.*—The election of a widow to accept the provisions of her husband's will in lieu of what she would otherwise be entitled to according to law may be made in express terms, or may be implied from acts and conduct, but in either event it must have been with knowledge of her rights and with the intention of election. To raise an inference of election from her conduct, where the rights of others have not been affected, it must appear that she knew of her right of election, and clear proof must be furnished of a choice on her part to accept the provision made by the will and to reject what she would otherwise be entitled to. Ambiguous acts and conduct will not, in general, be construed as an election. In the case in judgment every act relied upon as election by the widow was performed by her at the instance of her sons, who were the executors of her husband's will, and within less than a month after his death, and were of such an equivocal nature as not to amount to an election. During the two months which elapsed between her husband's death and the date of the renunciation of his will she remained in the mansion house occupied by him at the time of his

death and which was devised to her for life, but this she had a right to do as widow until dower was assigned, and her selection and acceptance of a cow and two hogs and her continued possession of other personal property might well have been referred to the assertion upon her part of her statutory rights as widow. The deed of renunciation is ample for that purpose, and no one is placed in any worse position by the renunciation than he would have been had the renunciation been made on the day of her husband's death. *Showalter v. Showalter*, 713.

7. *Testamentary Capacity—Burden of Proof—Presumption of Sanity.*—The burden of proving testamentary capacity is on the propounder of a will, but when a will is offered for probate and it is shown that all the statutory formalities have been complied with, and especially where it appears that the will is wholly in the handwriting of, and is signed by the testator, there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced. *Wallen v. Wallen*, 131.
8. *Testamentary Capacity—Undue Influence—Nature and Character of Will—Evidence.*—The nature and character of a will may be considered as a circumstance along with all the other circumstances affecting the testamentary capacity of a testator and the question of undue influence, but cannot of itself be sufficient to establish the want of testamentary capacity, or that the testator, in the execution of his will, was controlled by undue influence. *Wallen v. Wallen*, 131.
9. *Testamentary Capacity—Undue Influence—Evidence—Declarations of Testator.*—Upon issues of testamentary capacity and undue influence, the declarations of the testator not made contemporaneously with the execution of his will, are relevant evidence to show his feelings and affections towards the natural objects of his bounty, his mental condition as reflecting upon his testamentary capacity; but are not admissible to establish the substantive fact of undue influence. *Wallen v. Wallen*, 131.
10. *Undue Influence—Devise to Wife—Pecuniary Condition of Children—Evidence.*—Upon issues of testamentary incapacity and of undue influence exerted by a wife over her husband in making a will of all of his property to her, to the exclusion of his children, evidence that his children were poor and in needy circumstances is relevant, and may be considered as a circumstance in determining the validity of the testamentary disposition of his property. *Wallen v. Wallen*, 131.
11. *What Constitutes Undue Influence.*—The influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was

obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. *Wallen v. Wallen*, 131.

See EQUITY, 3; EVIDENCE, 12, 25.

#### WITNESSES.

1. *Calling by the Judge*.—It is not the practice in this state for the trial court, of its own motion, to call a witness in a civil case whom neither of the parties have called. *Blackwood Coal Co. v. James*, 656.
2. *Husband and Wife—Privileged Communications—Matters of Business*.—Under the statute of this state, neither husband nor wife can, without the consent of the other, testify (either during the coverture or afterwards) as to any communication made by one to the other while married, but this rule of privilege does not apply to communications between husband and wife with regard to a business matter in which he is acting as her agent. *Lurty v. Lurty*, 466.
3. *Impeachment of Witness—Judge's Notes*.—The judge's notes taken at a former trial of a case, however full they may be, are not receivable to contradict a witness, because not taken in the discharge of any official duty, but merely for his own private convenience. *Richards v. Com'th*, 881.
4. *Impeachment—Questions Tending Merely to Degrade Witness*.—A witness cannot be asked a question which merely tends to degrade him, and thereby affect his credibility, if the question is otherwise irrelevant. *Wallen v. Wallen*, 131.

See CRIMINAL LAW, 14















